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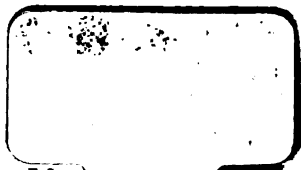




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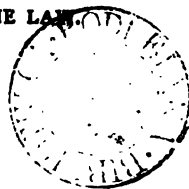
*Sec. Jur.*  
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AN  
**ABRIDGMENT**  
OF THE  
*MODERN DETERMINATIONS*  
IN THE  
**Courts of Law and Equity:**  
BEING A  
**SUPPLEMENT**  
TO  
*VINER'S ABRIDGMENT.*

BY SEVERAL GENTLEMEN  
IN THE RESPECTIVE BRANCHES OF THE LAW.

—  
VOLUME THE FIFTH.

Game—Butcher.



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1805.



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and Subdivisions.

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(A) Penalty of killing Game ; and how to be re- 14 Vin. 1.  
covered, and Pleadings.

1. **T**RESPASS *quare clausum fregit* ; the plaintiff declared that the defendant *being an inferior tradesman*, to wit an apothecary, such a day committed the trespass by hunting in the plaintiff's close : the defendant pleaded the general issue, not guilty ; and upon the trial, a verdict was found for the plaintiff, damages 1*s.*, and costs 4*os.*, subject to the opinion of the court, upon a case which stated, that the defendant, at the time of the trespass, was a surgeon and an apothecary, and not qualified to hunt, or kill game within the intent of the statutes ; that on the day mentioned in the declaration, he was hunting with divers others not qualified, in company with a person who was properly qualified to kill game, and committed a trespass in the plaintiff's close. And the question for the consideration of the court was, whether, upon these facts, the defendant should be deemed an *inferior tradesman* within the meaning of the statute 4 & 5 *W. & M. c. 23. s. 10* ? The court, being equally divided in opinion, delivered the same *seriatim* ; Noel, Just., and Willes, L. C. J. for the defendant, were of opinion " that the defendant could not be " said to be an inferior tradesman, nor a dissolute person ; and " consequently that the plaintiff ought to have no more costs than " damages." Bathurst and Clive, Just. *contra*, " all qualified " tradesmen are not inferior tradesmen, but all unqualified " tradesmen are inferior." *Buxton v. Mingay*, C. B. *Trin. 30 & 31 Geo. 2. 2 Wilf. 70.*

2. In an action of debt on the stat. 5 *Ann, c. 14.*, made perpetual by the stat. 9 *Ann, c. 25.*, to recover a penalty for killing game without being duly qualified ; it was held, that a *diploma*, conferring the degree of doctor of physic, granted by either of the universities in *Scotland*, does not give a *qualification* to kill game, under the 22 & 23 *Car. 2. c. 25.* *Jones v. Smart*, K. B. *Mich. 26 Geo. 3. 1 Durnf. & East's Rep. 44.*

3. The lord of a hundred, or wapentake, cannot grant a deputation to a gamekeeper. *The Earl of Ailesbury v. Pattison*, K. B. *Mich. 19 Geo. 3. Doug. 28.*

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4. In trespass against a justice of the peace for taking and carrying away the plaintiff's gun from him; upon the general issue, not guilty, the facts proved at the trial were, that the lord of the manor of *R.* duly appointed the plaintiff his *gamekeeper* within the said manor; that the plaintiff hunted and beat for game within the manor, and pursued a covey of partridges out of the manor, but could not find them; and as he was returning to the manor of *R.* he was met by the defendant out of that manor, who demanded his gun, and took it from him. It also appeared, that the plaintiff was neither a qualified person to kill game by the laws of the realm, nor was properly a menial servant to the lord of the manor: and upon these facts, two questions were reserved for the opinion of the court; first, whether the plaintiff was a person qualified to receive a deputation from the lord of the manor to be a gamekeeper; and secondly, supposing he was, whether the justice of the peace (the defendant), under the stat. 5 *Ann.* c. 14. §. 4. had a right to take the plaintiff's gun from him while he was sporting for the purpose of killing game in *another manor*, out of the manor of *R.*? As to the first question, the court were of opinion, that the plaintiff was a person properly qualified to receive a deputation from the lord of the manor to be a gamekeeper, although he was neither a qualified person, nor a menial servant to the lord of the manor; that the stat. 3 *Geo.* 1. c. 11. never was meant to check or hinder lords living at a distance from their manors from appointing any person whatsoever to kill game for the immediate use of the lord; if it was otherwise, this act would take away the right of every lord living at a great distance from his manor; the court were therefore of opinion, that the plaintiff was well qualified to kill game in the manor of *R.* and consequently to carry a gun for that purpose. And upon the second question, the court said, that the gamekeeper was neither within the words or meaning of the stat. 5 *Ann.* c. 14. §. 4. And were also of opinion, that the gun of a gamekeeper of a manor cannot be seized either *eundo*, or *redeundo*, or any *where else*, and that the defendant had no right to take away the plaintiff's gun from him. *Rogers v. Carter*, C. B. Mich. Term. 9 *Geo.* 3. 2 *Wils.* 387.

5. It is no defence to an action of debt for penalties on the game laws, that the defendant acted, *bonâ fide*, as gamekeeper to the manor in which the offence was committed under a void deputation. *Calcraft v. Gibbs*, Mich. 33 *Geo.* 3. K. B. 5 *Durnf. & East's Rep.* 19.

6. In a declaration on the stat. 5 *Ann.* c. 14. §. 4. for keeping a gun to kill and destroy the game, not being qualified, it is sufficient to aver generally *that the defendant is not qualified so to do by the laws of the realm*; without shewing that he had not 100*l.* a-year. *Bluet, qui tam v. Needs*, C. B. East. 7 & *Geo.* 2. Com. Rep. 522.

7. But in a conviction on the above statute, it is necessary to shew specially, that the defendant had not any of the qualifications mentioned in 22 & 23 *Car.* 2. c. 25. *The King v. Hill*, Hil.

*Hil. 12 Geo. 1. Ld. Raym. 1415. Stra. 66. 1 Burr. 153. & Doug. 345.* *Vide Rex v. Crowther, 1 Durnf. &*

*East's Rep. 127.* where it was said by the court, "that there is no case in which it has been directly decided that the evidence should negative every particular qualification. It cannot be so from the nature of the case."

8. In an action on the stat. 5 *Ann, c. 14.* for keeping and using a dog to kill and destroy the game, not being qualified, the declaration must state what sort of dog the defendant kept and used. *Reason v. Lisle, C. B. Trin. 11 G. 2. Com. Rep. 576.*

9. A declaration on the above statute stating, that the defendant used a gun *being an engine to kill and destroy the game*, without averring that he *used it for the destruction of the game*, was held to be good after verdict; though it might have been different perhaps if this ambiguity had been assigned as special cause of demurrer. *Avery v. Hoole, East. 18 G. 3. B. R. Cowp. 825.*

10. Debt on 8 *G. 1. c. 19.* for the penalty of 30*l.* for using a hound to destroy game. After verdict for the plaintiff, the judgment was arrested, for 5 *Ann, c. 14.* has not the word *bound*, and the words *other engines* come after *nets*, &c. and are applicable only to inanimate things. And this being a penal law cannot be extended. *Hooker v. Wilks, 13 G. 2. Stra. 1126.*

11. In an action of debt on the same statute, to recover several penalties, for several offences committed on the same day, the plaintiff can only recover *one penalty*. *Molton v. Cheeseley, Sittings after East. Term, 28 G. 3. Esp. Caf. Ni. Pri. 1 Ves. 123. See also Cowp. 640. & 3 Durnf. & East's Rep. 509.* So a conviction *super premissis* for three penalties of five pounds each

for killing three hares, where it appears that it was done at the same time, is bad; for the statute does not give five pounds for every hare, it being all but one offence. *Com Rep. 274.*

12. If a person, not qualified to kill game, kills a pheasant, or game by accident, he cannot take it away, without subjecting himself to the penalty for having game in his possession. *Ibid. 124.*

13. A man was convicted of killing rabbits in a private warren, by inquisition taken before a justice of peace, and was fined 20*s.* a rabbit: but this inquisition was afterwards quashed by the court, upon the ground that the justice had no authority to set a fine upon a man for such offence; for the stat. 22 & 23 *Car. 2. c. 25. s. 4.* gives treble costs and damages, *but no fine*: and the stat. 4 & 5 *W. & M. c. 23.* extends only to game, which cannot be extended to rabbits kept in a private warren. *Rex v. Yaiter, Hil. 8 & 9 W. 3. B. R. Ld. Raym. 151.*

14. To a conviction on the stat. 5 *Ann, c. 14.* for keeping a lurcher to destroy game, not being qualified, exception was taken that it did not shew the defendant made use of the dog to destroy game; but this exception was not allowed; for the statute is in the disjunctive, *keep or use*, so that the bare keeping a lurcher is an offence. *Rex v. Filer, Hil. 8 G. 1. Stra. 496.*

15. But a conviction on the same statute, for keeping a gun, was quashed; for it was said by the court, that a gun differs from nets and dogs, which can only be kept for an ill purpose, and therefore

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a man cannot be convicted for the bare keeping of a gun. *Rex v. Gardner, Trin. 11 G. 2. Stra. 1098. 1 Wils. 315. S. P.*

16. A conviction on the like statute stating, that the defendant *did keep and use a gun to kill and destroy the game*, was held sufficient. *Rex v. Thompson, Trin. 27 G. 3. K. B. 2 Durnf. & East's Rep. 18. See also 6 Durnf. & East's Rep. 177.*

17. Two persons cannot be convicted in separate penalties under the above statute for using a greyhound to destroy game, without being qualified, it being but one offence. *The King v. P. Bleasdale and another, Trin. 32 G. 3. B. R. 4 Durnf. & East's Rep. 809. See also Bull. N. P. 189. S. P.*

18. If a conviction under the 31 G. 3. c. 21. s. 4. which enacts, that all convictions against that act may be made out "in the form, or to the effect following," (giving the form) contain all the substantial parts of that prescribed, it is good, though it also contain something more; for surplusage will not vitiate a conviction. *The King v. J. Jeffreys, Trin. 32 G. 3. B. R. 4 Durnf. & East's Rep. 767.*

19. A *certiorari* was brought for removing a conviction upon the game laws, for the mere purpose of pleading it in bar of an action brought for the same offence, and not with any view of objecting to the conviction, the defendant having submitted to it and paid the penalty; but having applied to the justice of peace for a copy of the conviction, and being refused, he had no other means of obtaining the same but by *certiorari*: the prosecutor however afterwards set it down in the paper, and got it affirmed; and the question was, whether he was entitled to costs? The court said, that this was not a case within the intention of the act of parliament of 5 Ann, c. 14. s. 2, for this *certiorari* was not brought for vexation, nor to *over-haul* the conviction, but merely from necessity; and therefore the prosecutor was not entitled to his costs upon affirmation of the conviction. *Rex v. Midlam, Trin. 5 G. 3. B. R. 3 Burr. 1720.*

20. An indictment for killing a hare was quashed, this not being a matter indictable, the statute of Ann appointing a summary proceeding before justices of the peace. *Rex v. Buck, Hil. 12 G. 1. Stra. 679.*

21. By 10 G. 2. c. 32. s. 7. "Any person who shall be convicted of unlawfully coursing, hunting, taking in toils, killing, wounding, or taking away any red or fallow deer, in any open, or uninclosed forest or chase, where deer are usually kept, shall, during the continuance of the act 9 G. 1. c. 22., be guilty of a second offence of the like nature, and shall be thereof lawfully convicted, upon indictment, or information, such person shall be transported for the space of seven years."

This, and the following section are, by the 16 Geo. 3. c. 30. s. 27., respectively repealed.

*Sett. 9.* "If any person armed shall, during the continuance of the said act of 9 G. 1., come into any forest, chase, or park, wherein deer are usually kept, with an intent to hunt, or take away,

“ away, any red or fallow deer, and shall there unlawfully beat or wound any keeper, or page of any such forest, &c. their servants, or assistants, in the execution of his or their office, or offices, and be thereof lawfully convicted, every such person shall be transported for seven years.”

*Sec. 10.* “ If any person shall in any year between the 1st day of *June*, and the 1st day of *October*, by hays, tunnels, or other nets, drive, and take any wild duck, teal, widgroun, or any other water fowl, in any marshes, fens, or other places of resort for wild fowl, and shall be thereof convicted, he shall be liable to the same penalties as by virtue of the 9 *Ann*, c. 25. he would be liable to, if such offence was committed between the 1st *July*, and 1st *September*.”

22. By 2 *G. 3. c. 19.* “ No person, after the 1st *June* 1762, shall, upon any pretence whatsoever, take, kill, destroy, carry, sell, buy, or have in his possession, or use, any partridge, between the 12th *February* and the 1st *September* in any year; or any pheasant, between the 1st *February* and 1st *October* in any year; or any heath fowl, commonly called *black game*, between 1st *January* and 20th *August* in any year; or any grouse, commonly called *red game*, between 1st *December* and 25th *July* in any year.”

See the two following statutes, which repeal this act.

*Sec. 2.* “ If any person shall transgress this act in any of the aforesaid cases, every such person shall, for every partridge, pheasant, heath fowl, or grouse so taken, &c. forfeit five pounds to the person who shall inform or sue for the same.”

23. By 13 *G. 3. c. 55. f. 1.* “ No person shall, upon any pretence whatsoever, wilfully take, kill, destroy, carry, sell, buy, or have in his possession, or use, any heath fowl, commonly called *black game*, between 10th *December* and 20th *August* in any year; nor any grouse, commonly called *red game*, between 10th *December* and 12th *August* in any year; nor any bustard, between 1st *March* and 1st *September* in any year.”

*Sec. 13. of this act repeals that part of the 2 G. 3. c. 19. which relates to heath fowl and grouse.*

*Sec. 2.* “ If any person shall, in any of the cases aforesaid, offend, contrary to the true intent and meaning of this act, he shall forfeit, and pay any sum of money not exceeding twenty pounds, nor less than ten pounds; and for the second, and every subsequent offence, any sum of money not exceeding thirty pounds, nor less than twenty pounds.”

24. By 36 *G. 3. c. 39.* (after repealing part of the 2 *G. 3. c. 19.*) it is enacted, “ That no person shall, on any pretence whatsoever, take, kill, destroy, carry, sell, buy, or have in his possession, or use, any partridge, between 12th *February* and 14th *September* in any year; and if any person shall transgress this act in the case aforesaid, every such person shall be liable to the same penalty as mentioned in the above recited act.”

25. By 28 *G. 2. c. 12.* (after reciting 5 *Ann*, c. 14.) it is enacted, “ That if any person whatsoever, whether qualified or not qualified to kill game, shall sell, expose, or offer to sale, any hare, pheasant, partridge, moor, heath game, or grouse, every

“ such person shall, for every such offence, be subject and liable  
 “ to the same forfeitures, pains, and penalties as are inflicted by  
 “ the said recited act upon higglers, &c. for buying, selling, or  
 “ offering of game to sale.”

*Sec. 2.* “ If any hare, &c. shall be found in the shop, house, or  
 “ possession of any poulterer, salesman, fishmonger, cook, or  
 “ pastry-cook, the same shall be adjudged, deemed, and taken to  
 “ be an exposing thereof to sale.”

26. By 5 G. 3. c. 14. s. 6. “ If any person shall, from and after  
 “ 1st June 1765, wilfully and wrongfully, in the night time, en-  
 “ ter into any warren or grounds lawfully used or kept for the  
 “ breeding or keeping of conies, although the same be not in-  
 “ closed, and shall take or kill, in the night time, any coney,  
 “ against the will of the owner or occupier thereof, or shall be  
 “ aiding and assisting therein, every such person so offending shall  
 “ and may be transported for seven years, or suffer such other  
 “ lesser punishment, by whipping, fine, or imprisonment, as the  
 “ court, before whom such person shall be tried, shall in their dis-  
 “ cretion award and direct.”

*Sec. 8.* enacts, “ That nothing in this act contained shall extend  
 “ to prevent any person from killing and destroying, or from  
 “ taking and carrying away, in the day time, any conies that shall  
 “ be found on any sea or river banks, erected or to be erected for  
 “ the preservation of the adjoining lands from being overflowed,  
 “ or upon any land within one furlong distance of such sea or  
 “ river banks; but that it shall and may be lawful to and for any  
 “ person to enter upon any such banks or lands, within the county  
 “ of Lincoln, and to kill, destroy, take, and carry away, in the day  
 “ time, to his own use, any conies found thereon, he doing as  
 “ little damage as may be to the owner or tenant of such banks or  
 “ lands.”

By s. 2. of  
 this act all  
 the provi-  
 sions of the  
 10 G. 3.  
 c. 19. are  
 repealed.

27. By 13 G. 3. c. 80. (after reciting the 10 G. 3. c. 19.) it is  
 enacted, “ That if any person shall knowingly and wilfully kill,  
 “ take, or destroy any hare, pheasant, partridge, moor game, or  
 “ heath game, or use any gun, dog, snare, net, or other engine,  
 “ with intent to kill, take, or destroy any hare, &c. in the night,  
 “ that is to say, between the hours of seven at night and six in  
 “ the morning, from 12th October to 12th February; and between  
 “ the hours of nine at night and four in the morning, from 12th  
 “ February to 12th October; every such person, being convicted  
 “ thereof, shall forfeit and pay, for the first offence, any sum not  
 “ exceeding twenty pounds nor less than ten pounds; and for the  
 “ second offence, any sum not exceeding thirty pounds nor less  
 “ than twenty pounds.”

*Sec. 6.* enacts, “ That if any person shall upon a Sunday, or on  
 “ Christmas-day, in the day time, knowingly and wilfully take,  
 “ kill, or destroy any hare, pheasant, partridge, heath game, or  
 “ moor game, or shall upon a Sunday, or on Christmas-day, use  
 “ any gun, dog, net, or engine for taking, killing, or destroying  
 “ any hare, &c. every such person, being convicted thereof, shall  
 “ be

## Game.

7

" be subject to the like forfeitures and penalties as are herein-  
" before enacted to be inflicted for other offences against this  
" act."

28. By 25 G. 3. c. 50. f. 1. (after repealing the statute 24 G. 3.  
c. 43.) it is enacted, " That every person in *Great Britain*, who  
" shall use any dog, gun, net, or other engine for the taking or  
" destruction of game, not acting as a gamekeeper, under or by  
" virtue of a deputation or appointment duly registered, shall an- Vide 31 G. 3.  
" nually take out a certificate thereof; that every deputation or c. 21.  
" appointment of a gamekeeper, granted to any person by any  
" lord or lady of a manor in *England* or *Wales*, shall be registered  
" with the clerk of the peace of the county, riding, or place in  
" which the said manor lies, and the gamekeeper, so appointed,  
" shall annually take out a certificate thereof."

SECT. 8. " If any person shall use any greyhound, hound, pointer,  
" setting dog, spaniel, or other dog, or any gun, net, or other  
" engine for the taking or destruction of any hare, pheasant, par-  
"tridge, heath fowl, or grouse, or any other game what-  
" soever, without having obtained such certificate, every such  
" person shall forfeit and pay the sum of twenty pounds."

SECT. 9. " If any person, to whom any deputation or appointment  
" of a gamekeeper shall have been or shall be granted as aforesaid,  
" shall, for the space of twenty days next after such deputation  
" shall thereafter be first granted, neglect or refuse to register the  
" same, and take out a certificate thereon, in the manner herein-  
" before directed, every such person shall forfeit and pay the sum  
" of twenty pounds."

### (B) Prosecution; when, and how, and by whom tried. 14 Vin. 4.

1. BY 2 G. 3. c. 19. f. 5. (after reciting the statute 8 G. 1. c. 19.)  
it is enacted, " That all pecuniary penalties under the said  
" act may be sued for and recovered to the sole use of the prose-  
" cutor; and if he recovers the same by action or information,  
" he shall be entitled to double costs."

SECT. 6. " That no action or information shall be brought or ex-  
" hibited, but within the space of six months next after the mat-  
" ter or thing done, for which the same shall be commenced or  
" exhibited as aforesaid."

2. By 2 G. 3. c. 29. (after reciting the statute 1 Jac. 1. c. 27.)  
it is enacted, " That if any person shall shoot at, with an intent  
" to kill, or shall, by any means whatever, kill or take, with a  
" wilful intent to destroy, any house dove or pigeon, and shall be  
" thereof convicted before any justice of the peace of the county  
" wherein any such offence shall be committed, every person so  
" offending shall, for every such offence, forfeit and pay the sum  
" of twenty shillings to the informer; and in case the money shall  
" not be forthwith paid, the offender to be committed to gaol for  
" any



## Game.

" any time not exceeding three calendar months, nor less than one calendar month."

*Seft.* 2. " Provided always, that nothing in this act contained shall be construed, deemed, or taken to hinder any owner of a dove cote, pigeon house, or other place erected for the preservation or breeding of pigeons from taking, killing, or destroying all or any house doves or pigeons which shall at any time be taken therein."

*Seft.* 3. " Provided further, that no person, who shall be convicted of any offence against this act, shall be liable to be convicted for any such offence under any former or other act; and that no person shall be prosecuted for any offence against this act, unless the prosecution shall be commenced and carried on with effect within the space of two calendar months after any such offence shall be committed."

[D]

## Gaming.

14 Vin. 4.

## (A) Restrained by Common Law or Statutes.

*Vide the Statute.*

1. BY 18 G. 2. c. 34. If any person shall win or lose at play, or by betting, at any one time, the sum or value of 10*l.*, or within the space of 24 hours, the sum or value of 20*l.*, he shall be liable to be indicted for such offence within six months, either in B. R. or at the assizes; and being convicted, shall be fined five times the value of the sum lost or won, which (after such charges as the court shall judge reasonable allowed thereout to the prosecutor and evidence) shall go to the poor.

2. By same statute, the penalties of 12 G. 2. c. 28. are extended to the game of roulette, *alias* roly poly, and all prohibited games with cards or dice.

3. By 30 G. 2. c. 24. *f.* 14. persons keeping public houses, &c. suffering gaming there by journeymen, labourers, servants, or apprentices, and convicted by justices of peace, shall forfeit 40*s.*, and for every offence afterwards 40*l.*

4. By 25 G. 2. c. 36. any house, room, garden, or other place kept for public dancing, music, or other entertainment of the like kind, in London or within 20 miles thereof, without licence, according to that statute (except *Drury Lane*, *Covent-Garden*, and *Hay-Market* theatres, and other entertainments exercised by letters patent or licence of the crown or lord chamberlain) shall be deemed a disorderly house or place, and the keeper thereof shall forfeit

forfeit 100*l.* with full costs to him who shall sue (in six months) in any of the courts at *Westminster*. And the person who shall appear to act as master, or as having the management of such disorderly house, shall be deemed a keeper thereof.

5. 27 *G. 3. c. 1.* which takes away the summary jurisdiction of magistrates over offences concerning the lottery, extends only to state lotteries, and does not repeal their power over games of chance or lotteries prohibited by 12 *G. 2. c. 28.* *Rex v. Lifton*, 5 *Term Rep. B. R.* 338.

(B) What Gaming is within the several Statutes. 24 *Vin. 6.*

1. **P**LAYING at bowls, out of *Christmas*, subjects every labourer to the penalty of 40*s.* under 33 *H. 8. c. 9. f. 16.* but does not make him an idle and disorderly person under 17 *G. 2. c. 25.* *Rex v. Clarke*, *Cowp.* 36.

2. Horse-racing is gaming within 16 *Car. 2. c. 7.*, and money won as a wager on it cannot be recovered. *Goodburn v. Marley*, 2 *Stra.* 1159. *Blaxton v. Pye*, 2 *Wils.* 309. *Johnson v. Baun*, 4 *Term Rep. B. R.* 1. See also *Bonner v. Quick*, cited per *Aston*, *J. 2 Black. Rep.* 708.

3. A foot-race is within 9 *Ann. c. 14.* But if *A.* lays a wager with *B.* that *C.* cannot run on a certain day four miles in twenty-one minutes and an half, and *C.* does run it, and the money was paid to *B.*, if it is not laid that *C.* was playing at a game called a foot-race, such wager is not betting within the statute. *Lynell v. Longbottom*, 2 *Wils.* 36.

One person running alone against time is a foot-race within the statute. *Brown v. Berkley*, *Cowp.* 281.

4. Cricket is a game within 9 *Ann.* and a bond given as a collateral security for money won at it is void. *Jeffreys v. Walter*, 1 *Wils.* 220.

5. *Assumpsit* on a wager of 100 guineas and the expences of travelling, that *A.* would perform a journey of 240 miles in a post chaise and pair of horses in 24 hours, is an illegal wager, and judgment was arrested on that account after plaintiff had obtained a verdict. *Ximenes v. Jacques*, 6 *Term Rep.* 499.

6. A horse-race for 25*l.* a side, play or pay, though one gives the other 5*l.* to make the match, is a match for 50*l.* and legal within 13 *G. 2. c. 19.* *Bidmead v. Gale*, 4 *Burr.* 2432.

7. Tumbling is not an entertainment of the stage within the meaning of 10 *G. 2. c. 28.* *Rex v. Handy*, 6 *Term Rep.* 286.

8. But dancing at the opera house is, and therefore no action can be maintained for the breach of an agreement "to dance at the king's theatre in the *Hay-Market*, or at such other place as the plaintiff should appoint," if it appear that no licence for that theatre was granted by the Lord Chamberlain as required by 10 *G. 2. c. 28.* and that the plaintiff did not request the defendant  
to

to dance at any other place that was so licensed. *Gallini v. Laborie*, 5 Term Rep. B. R. 242.

9. No action will lie on a wager respecting the mode of playing an illegal game; therefore the judge at *nisi prius* ordered a cause to be struck out of the paper in which the wager was "whether there were more ways than six of nicking seven on the dice," allowing seven to be the main, and eleven a nick to seven, because all games with dice are prohibited. *Brown v. Leeson*, 2 Hen. Black. Rep. 43.

10. If the parties play from Monday evening to Tuesday evening without any interruption, except for an hour or two at dinner, this is all one sitting; for to lose at one sitting is to lose in a course of play where the company never parts, though they may not actually be gaming the whole time. *Bowes v. Booth*, 2 Black. 1226.

11. If five guineas be betted against ten, the party who wins the five guineas cannot recover them, because by 9 Ann the other could not have recovered the ten, and therefore there is no mutuality. *Clayton v. Jennings*, 2 Black. 706.

12. Money lent at play on a man's bare word may be recovered, for it is not within stat. 9 Ann, c. 16. which has not the word contract. *Barjeau v. Walmsley*, H. 19 G. 2. Stra. 1249.

13. A. gives a bill of exchange drawn by himself on himself, and accepted by himself, to B.; part of the consideration is money lost at play, the rest money lent at the time and place of play; B. cannot recover any thing on the bill of exchange, but he can recover the money lent on the contract, and shall have interest from the time the bill became payable to the judgment. *Robinson v. Bland*, M. 1 G. 3. 2 B. M. 1077. Vide Doug. 741, (714.)

14. If A. gives a note to B. for money by him knowingly advanced to A. to game with at dice, and B. indorses it for a full consideration to C. who is ignorant that any of the money had been lent for gaming, yet C. cannot maintain an action for it. And Lee, Ch. J. said the dictum of Holt, C. J. in *Hussey v. Jacob*, was not the point adjudged, and all the bar wondered at it. *Bowyer v. Bampton*, Tr. 14 G. 2. Stra. 1155.

15. A wager that A. had purchased a waggon of B. is not void at common law, nor prohibited by statute 14 G. 3. c. 48. and an action may be maintained on it. Per three justices, *Buller*, J. contra. *Good v. Elliot*, 3 Term Rep. 693.

16. That wagers are legal by the law of England, unless forbidden by statute. See *Jones v. Rendall*, Cowp. 37. *Da Costa v. Jones*, ib. 729. and the Cases cited in *Good v. Elliot*, ut supra.

14 Vin. 7.

### (C) Actions and Pleadings.

1. IF defendant is convicted on 9 Ann, c. 14. which gives five times the value to the common informer, the judgment is only *quod convictus est*, and an action for the forfeiture must be brought on the judgment. *Rex v. Luckup*, 2 Stra. 1048.

2. Debt

See 7 T.  
Rep. 461.  
n. (a.)

## Gaming.

11

2. Debt on bond—Plea that part of the sum mentioned on the condition, *scilicet* 1500*l.* was won by gaming contrary to the statute, *per quod* the bond became void. Plaintiff replies, that the bond was given for a just debt, and traverses that the 1500*l.* was won by gaming *contra formam statuti modo et forma*, as the defendant has pleaded, *demurrer inde*. The replication was held bad; for the material part of the plea is, that part of the money for which the bond was given was won by gaming, and *scilicet* so much is only matter of form of which no notice should be taken on the replication. But two objections were made to the plea. 1st. The words of the statute are not pursued: the statute says, the bond shall be void when it is given for money won by gaming; whereas the plea is, that the money for which the bond was given, was won by gaming. *Sed per Cur.* it amounts to the same thing, and is good to a common intent. 2d. It is not shown at what play or game the money was lost, and that ought to appear to the court, that they may judge whether it is such gaming as is contrary to the statute. And *per Cur.* it ought to be mentioned, for it is matter of law, and not evidence, and the saying in general, that it was *contra formam statuti*, will not be sufficient. Wherefore the plaintiff had judgment. *Colborne v. Stockdale*, 1 *Str.* 492.

## (D) Cases in Equity.

[F]

14 Vin. 8.

1. **A** Mortgage ordered to stand as a security for the money *bond fide* advanced, but to be forfeited as to the money won at play. The enforcing the gaming act is of great consequence to the public, and not confined to the interest of private persons. *Nov. 29th, 1742. Fleetwood v. Jansen and another*, 2 *Atk.* 467.

2. Bond for money won at play, and part of it paid. Court ordered the money to be repaid, and relieved against the bond. *April 24th, 1755. Mawden v. Shadwell*, *Amb.* 269.

3. The right to sue for money lost at play, given by statute 9 *Ann.* c. 14. to the loser, is a vested interest; and upon his bankruptcy passes to his assignees. *Dec. 14th, 1794. Brandon v. Sands*, 2 *Ves. jun.* 514.

4. A bill for discovery of money won at play, by a common informer, will not lie, till he has commenced some suit for relief. *East. 32 G. 3. Mynd v. Francis*, 1 *Anstr.* 5.

5. Bill for discovery of money and relief on 9 *Ann.* for penalties against the winner of more than 10*l.* at play. The plaintiff did not state himself to have been the loser, nor that three months had elapsed before the bill filed, which is required by the statute before a suit can be commenced by a common informer. And a demurrer was allowed. *Mich. 35 G. 3. Hudson v. Davis*, 2 *Anst.* 504.

6. Bill for an injunction, and to have certain bills of exchange, upon which an action had been commenced at law, delivered up, having

## Gaming.

having been given for money won at play, ruled good upon demurrer *Hil.* 35 G. 3. *Newman v. Franco*, 2 *Anstr.* 519.

7. A bill lies to have a discovery of the consideration of a security alleged to have been given for money won at play, and to have it delivered up. *Mich.* 36 G. 3. *Andrews v. Berry*, 3 *Anstr.* 634.

8. In a bill of discovery to support an action by a common informer for money won at play, it is sufficient to state that the defendants, or some of them, for the benefit and on account of all, played and won. And it is not necessary to state the nature of the action brought, but that an action was brought on the stat. 9 *Ann.*, to recover the money, and to shew by the facts that an action lay. *Hil.* 37 G. 3. *Cowan v. Phillips and others*, 3 *Anstr.* 843.

9. Injunction granted to prevent the negotiating a note obtained at play, upon affidavit, before service of subpoena. *Hil.* 37 G. 3. ——— *v. Blackwood and others*. 3 *Anstr.* 851.

[ G ]

## Gaol.

24 Vin. 9.

## (B) Belong, to whom.

1. **BY** 27 G. 3. c. 17. it is enacted, "That from and immediately after the payment of 10,500*l.* to certain persons therein named, the prison of the marshalsea of the court of king's bench, and the power of granting the custody of the said prison, and the office of marshal of the marshalsea, shall be re-vested in his majesty, his heirs, and successors, and shall for ever thereafter remain and be unalienable."

24 Vin. 10.

## (C) Repaired ; at whose Expence.

1. **T**HE lord of a franchise is not bound, merely as lord, to repair the gaol within it, without an immemorial usage to charge him. *Rex v. the Earl of Exeter*, *Trin.* 35 G. 3. 6 *Durnf. & East's Rep.* 373.

## Gaoler.

[ G ]

### (C. 2) Punishable for other Offences than Escapes. 14 Vin. 18.

1. **BY** 24 G. 2. c. 40. f. 13. it is enacted, " That if any gaoler, " keeper, or officer of any gaol, prison, or house of correction, shall sell, use, lend, or give away, or knowingly permit, or suffer any spirituous liquors, or strong waters to be sold, used, lent, or given away in any such gaols, prisons, or houses of correction, or brought into the same, other than and except such liquors as shall be prescribed by the physician, surgeon, or apothecary, every such gaoler, &c. shall, for every such offence, forfeit the sum of one hundred pounds; and for the second offence, it shall be deemed a forfeiture of his office."

2. By 32 G. 2. c. 28. f. 11. it is enacted, " That upon the petition, in term time, of any prisoner, complaining of any extortion by any gaoler, or of any other abuse whatsoever committed by such gaoler, unto any of his majesty's courts of record at *Westminster*, from whence the process issued by which any person, who shall so petition, was arrested, or under whose power or jurisdiction any such gaol, prison, or place is; or, in vacation time, to any judge, or to the judges of assize or justices of great sessions; every such court, judges of assize, and justices of great sessions, are hereby authorized and required to hear and determine the same, in a summary way, and to make such order thereupon for redressing the abuses which shall be complained of, and for punishing such officer or person complained against, and for making reparation to the party injured, as they shall think just, together with the full costs of every such complaint."

### (D) Allowances.

1. **BY** 32 G. 2. c. 28. f. 12. it is enacted, " That no gaoler shall demand, take, or receive, directly or indirectly, of any prisoner for debt any other or greater fees whatsoever for his commitment or coming into gaol, chamber rent there, release or discharge, than what shall be mentioned or allowed in the table of fees, which shall be settled in the manner hereinbefore directed; and that every person, who shall offend against this act, shall forfeit to the party grieved fifty pounds."

2. The

2. The warden of the *Fleet* prison cannot demand an additional fee for expedition in returning a writ of *habeas corpus*. *Johnson v. Smith*, 1 *Hen. Bl. Rep.* 105.

24 Vin. 19 (A) Glebe in general; and in what Cases it shall pay Tithes.

1. A Mill is erected upon glebe land, parcel of a parsonage, which came to the king by the statute of dissolutions. The vicar, who is endowed with small tithes, sues the parson for the tithes of the mill. The parson applies for a prohibition: 1st, because the glebe upon which the mill is erected was discharged of the payment of tithes: 2d, because the vicar's endowment does not extend to the tithes of a mill. But the prohibition was denied; for the mill, being lately erected, tithes ought to be paid for it, and the extent of the endowment is a matter triable in the spiritual court. The discharge of the glebe cannot extend to a mill erected *de novo*. *Anon. Tr. 15 Jac. 1. 1 Gwil. on Tithes*, 286.

2. In an action of trespass upon the opening of the cause upon demurrer, it was holden by the court, that a rectory might be without glebe. For by *Hyde*, the parson may convey away all his glebe; and he said, that he had seen several compositions between the vicar and the parson, by which the parson gave all his tithes and glebe to the vicar, and reserved a rent only for himself. And by *Whitlocke*, originally a parson might be without glebe. For the common law, upon creating a parson, gave him tithes only, and the glebe is only an additament to him *ex dono fundatoris*. *Edgar and others v. Sorrel and others. Tr. 5 Car. 1. 2 Gwil. 435*.

3. Bill by vicar for tithes.—Defendant insisted he was tenant of the glebe lands under *Eaton* college, and that no tithe for that land was due to the vicar. *Per Cur.* In regard the glebe land of which the plaintiff demands tithe is not of common right tithable to the plaintiff, and the plaintiff has not made any sufficient proof of payment of tithes to him for the same, let the bill be dismissed. *Streaton v. Downes, Tr. 2 W. & M. 2 Gwil. 536*.

4. A vicar, endowed with the glebe, has a right to the great tithes growing thereon, although he has no right to the great tithes in general in the parish. So held.

*N. B.* In this case, the vicar had let his glebe which was sowed with corn, and he then died. The court decreed, that the next vicar should have the tithe of the corn, and not the impropiator. *Sanders v. Ryall, H. 3 & 4 W. & M. 2 Gwil. 537*.

## Goldsmiths' Notes.

[ D ]

See *Suppl. tit. Bills of Exchange, (B), &c.*

14 Vin. 21.

## Good Behaviour.

[ G ]

(B) In what Cases, and of what Persons, and by whom. 14 Vin. 22.

1. IN the case of a libel, no surety of the peace or bail can be required: and *per Pratt, Ch. Just.* "I cannot find that a libeller is bound to find surety of the peace, in any book whatever, nor ever was in any case, except one, *viz.* the case of the seven bishops, where three judges said, that surety of the peace was required in the case of a libel: Judge *Powell*, the only honest man of the four judges, dissented, and I am bold to be of his opinion, and to say that case is not law." *Rex v. Wilkes, East, 3 G. 3. C. B. 2 Wilf. Rep. 160.*

(D) Discharged, or superseded.

1. BY consent, the recognizance may be discharged. *Rex v. Earl Ferrers, Mich. 32 G. 2. Bur. Rep. 703.*

## Grants.

[ F ]

*Note 1 to Co. Litt. 384. b.* contains a full discussion of the operation of the word "Grant" to imply a warranty. The legal import of this term appears, in conveyances in fee simple, to have changed with the alteration made in the relative situations of grantor and grantee by the statute of *Quia Emptores*; but it may be observed, as to its etymon, that it is merely a contraction of the verb "*garantir*," to warrant.



14 Vin. 119. (R. a) Grants *made good in Equity*, though not strictly good in Law.

1. **HENDERSON**, the plaintiff, being assignee of a lease of a public house, without any covenant restrictive of alienation without licence, agreed for the grant of a lease of the same, with proper and usual covenants. A covenant not to assign without licence does not come within a contract to grant a lease with common and usual covenants. *Jan. 1792. Henderson v. Hay, 3 Bro. 632.*

2. Grants are to be taken as strongly in favour of the objects and against the grantor, as fair inference will allow. *Feb. 1796. Swann v. Fonnerau, 3 Vef. jun. 48.*

3. When a bill is filed for an account of tithes against one who had a lease of his own, and the other tithes in the parish, and the whole question in the cause turns on the validity of the lease, and of the notice given to determine it, equity will not proceed till those points are settled at law. *Hil. 34 G. 3. Bousher v. Morgan, 3 Anstr. 404.*

Vide *Faits.* (T. a)

14 Vin. 160. (S. a) Relief in Equity, in respect of the *Consideration*.

1. **THE** court will not set aside an agreement for an annuity, though the annuity was sold too cheap, if there is no imposition. 1743. *Floyer v. Sir Brownlow Sherrard, Amb. 18.*

2. A conveyance, for *consideration*, not to be set up as a gift, and where it was for a *fictional* consideration inserted by the grantor himself though found to be a gift by a jury, it was set aside in equity. *July 9th, 1755. Bridgman v. Green, 2 Vef. 627.*

3. Grant of a reversionary rent charge after the death of plaintiff's father, who was old and infirm, upon unreasonable terms set aside, but to remain as a security for the money really advanced, and costs to be paid as in redeeming a mortgage. 18 G. 3. 1778. *Gwynne v. Heaton and others, 1 Bro. 1.*

4. A deed entered into by parties apprized of their rights, in order to put an end to a suit, although upon *inadequate* considerations, shall not be set aside. *Mich. 19 G. 3. 1778. Stephens v. Lord Viscount Bateman, 1 Bro. 22.*

5. Leases for lives obtained by *agents* of a deceased person having been of weak intellects, and upon *inadequate* considerations, set aside. *July 1783, Garfide v. Isberwood, 1 Bro. 558.*

6. Bill to set aside an agreement for an annuity (which had been paid) during the uncle's life time, in consideration of a sum payable at his death, *sans issue*, dismissed. *Hil. 1786. Henley v. Aston, 2 Bro. 17.*

7. An

7. An annuity purchased for *four years purchase*, on a life of 30, subject slightly to the gout, set aside for inadequacy of consideration. *East*, 1787. *Henthcote v. Paignon*, 2 Bro. 167.

8. A trustee for the sale of estates, for payment of debts, purchased them himself by taking advantage of the confidence reposed in him, and, previous to the completion of the contract, sold them at a *highly advanced price*; he was decreed a trustee for the sums produced by the second sale, for the original vendor. 11th December 1788. *Fox v. Mackreth*, 2 Bro. 400.

For more of this title, see Supplement, tit. *Covenants, Deeds, Fails, and Warrants*.

## Guardian and Ward.

[F]

(N. 3) *Who may be appointed Guardian, and by whom, and what shall be said an Appointment within the 12 Car. 2. c. 24.* 74 Vin. 120.

1. A Presbyterian, who had three infant daughters bred up that way, and had three brothers presbyterians, makes his will and appoints his brothers and a clergyman of the church of England guardians to the three infant daughters, and dies, having sent his eldest daughter to his next brother; the clergyman gets the two other daughters into his custody, and places them at a boarding-school where they are bred according to the church of England; and brought his bill to have the eldest daughter placed out with her two sisters. The testator's three brothers brought their bill to have the two daughters delivered to them, offering *parol evidence* that the testator directed and intended to have his children brought up presbyterians; but the court declared that no proof ought to be admitted in the case of the devise of a guardianship, any more than in case of a devise of land. *Trin.* 1730. *Storke v. Storke*, 3 P. W. 51.

2. The mother's appointment of a guardian to her son by will is void, the statute confining the power of appointment of a testamentary guardian to the father only. *June* 18, 1747. *Ex parte Edwards*, 3 Atk. 519.

3. A direction in a will, that the wife should have the education of the children, may amount to a guardianship. *Per Hardwicks, Chancellor*, March 1747-8. *Mendes v. Mendes*, 1 Ves. 91.

4. On a devise of a guardianship, the court admitted *parol evidence* to shew the father's intention as to the education of his children. *November* 1750. *Anon.* 2 Ves. 57.

5. A grandfather cannot appoint guardians of his grandson, but he may give his estate on what condition he pleases, and the father submitting is bound by it. 3d April 1756. *Blake v. Leigh, Amb.* 306.

6. There is no decided case that guardians can be appointed for a child (by a stranger), during the life of the parent; but the court will take care that the child shall be educated according to his expectations. 1789. *Powel v. Cleaver*, 2 Bro. 499. *Ex parte Warner*, 4 Bro. 102. S. P.

14 Vin. 175. (N. 5) What the Infant may do without a Guardian.

1. **A**N infant may bind himself in this court by a marriage contract, especially if the wife accepts pin-money, or after the husband's death accepts her jointure under that contract. *Smith v. Low*, 1 Atk. 489. June 1739.

2. If an infant, who contracted a debt during his minority, confirms it after he comes of age, it will bind him, though it was voidable at his election. *Smith v. French*, 2 Atk. 245. February 1741.

3. Where an agreement appears upon the face of it to be prejudicial to an infant, it is void; but if for his advantage, then voidable only. *Harvey v. Ashley*, 3 Atk. 610. March 1748.

4. An infant may execute a power, where he is a mere instrument only. *Hearle v. Greenbank*, 3 Atk. 710. May 1749.

5. He may present to a church; and, as it is said, he may declare the uses of a fine or recovery, where he suffers it without a privy seal; and the use is good, and the fine and recovery shall stand. *Ibid.*

6. But an infant cannot dispose of his real estate, *Ibid.* 712.

14 Vin. 175. (N. 6) Assigned or appointed by the Court; who may be, and in what Cases.

1. **W**HERE a father, by his will, names guardians to his natural children, the court will appoint them guardians, without reference to the master. April 28, 1789. *Ward v. St. Paul*, 2 Bro. 583.

2. The court refused to appoint a partnership guardians. 1799. *De Mazar v. Pybus*, 4 Ves. jun. 649.

14 Vin. 173.

(N. 7) Assigned or admitted; how.

1. **P**ER Lord Hardwicks. There may be an application to the court in the case of a guardianship of children, though there be no cause depending, and a testamentary guardianship is not assignable. Mich. 1737. *Mellish v. De Costa*, 2 Atk. 14.

## Guardian and Ward.

19

2. A guardian may be appointed, though no cause depending. *November 1754. Ex parte Bircbell, 3 Atk. 813.*
3. Petition that a guardian may be assigned, unless to carry on a suit or protect an interest, must be pursuant to the statute. 1783. *Ex parte Becker, 1 Bro. 556.*

### (O) Guardian in Socage; who shall be Guardian. 14 Vin. 177.

A N infant, where there is no testamentary guardian or mother, having socage land, may chuse a guardian at 12 if a female, at 14 if a male. *July 1751. Anon. 2 Ves. 374.*

### (O. 2) Guardian removed.

14 Vin. 179.

1. A Guardianship of an infant, notwithstanding he marries, does not determine till 21. *Mendes v. Mendes, 3 Atk. 625. March 1747.*
2. Two young ladies petitioned to be taken out of the custody of their mother, who had been appointed guardian of them by the court, upon affidavits of her putting them to separate schools, and endeavouring to marry the younger to one Sperry. A Frenchman of the name of *Quan*, whose father had the care of the two infants at *Paris*, married the eldest when she was 11 years of age only; he petitioned for a decree of cohabitation, and to have some of her money paid him. And the mother petitioned for a reimbursement of her expences in bringing them over. The court refused to remove the guardian, but made orders regulating her conduct, and placed the infants in the care of another person, and allowed the mother a liberal maintenance to reimburse her the expences which she claimed; and refused the petition of *Quan* entirely. *Nov. 1748. Moach v. Garuan, 1 Ves. 158.*
3. A guardian will not be appointed after marriage, nor discharged because of a marriage. *Ibid.*
4. On the application of an infant, and by consent of his relations and the guardians, other persons were appointed to have the care of him till further order. And the court said, that though it was reasonable to do so in this case, yet in general it ought not to be done; and if guardians had taken the trust upon themselves, the court in general would compel them to act. *May 1752, Spencer v. Earl of Chesterfield, Amb. 146.*

### (P. 2) Guardian in Socage removed.

14 Vin. 180.

*Vide (O. 2)*

24 Vin. 181. (P. 3) Power of the Guardian over the Estate of the Infant.

1. **A** Guardian cannot change the nature of the estate, by turning money into land, nor a lease for years into a freehold. *Hil. 1730. Witter v. Witter, 3 P. W. 100.*
2. *A.*, who had a bishop's lease to her and her heirs during three lives, devises the same to her daughter, an infant, and directs the guardians and trustees to make purchases for the infant's benefit. The guardian, upon the decease of one of the three lives, took a new lease for three new lives. The infant dies, the lease shall go to the heirs *ex parte paterna*; for the new lease is to be considered as a new acquisition, and to vest in the infant as a purchase. The reason why an infant's personal estate turned into real is still considered as personal is on account of the different ages at which an infant can dispose of his personal and his real, and not in favour of one representative more than another. *July 1739. Pierfon v. Shore, 1 Atk. 480.*
3. The act of a guardian, where a *reasonable* one, will bind the infant, and will have the same consequences as if done at full age, otherwise if wantonly done by the guardian without any real benefit to the infant. *Ibid.*
4. *Richard Lloyd* devised some land and houses built thereon to his six children; the mother acting as *guardian* to the children, who were all infants, demised the premises for 41 years; the eldest son joined in the lease, and covenanted that the rest of the children, when of age, should confirm it. They all attained 21<sup>st</sup> and accepted the rent for above 10 years after the youngest came of age. The court established the lease for the residue of the term. *Smith v. Low, 1 Atk. 489. June 1739.*
5. Where a person of age when he makes a lease, and has nothing in the premises, but they afterwards descend to him, the lease shall enure by way of estoppel, otherwise if he were an infant. *Ibid.*
6. Where there is an application to the court to lay out part of an infant's personal estate in land, if he dies, or does not approve when of age, the property will not alter. *Sergefon v. Sealey, 2 Atk. 413. October 1742.*
7. Where an infant is under guardianship, his real estate ought to be taken care of, and applied according to the nature of it; and the court will take care it shall be so, and will not suffer his real property to be changed into personal during his infancy, or his personal into real; in order that the persons, who are to come into succession, may find the property in the same state, and without being altered by those who had no power to alter it. *May 1750. Rook v. Warth, 1 Ves. 461.*

(P. 4) Power as to the Person of the Infant; and in 14 Vin 183.  
 what Cases the Court will deliver the Infant to the  
 proper Guardians; and how far restrained by  
 Chancery.

1. **A** Rich uncle takes his niece into his house, maintains her there, and dies, having left her 10,000*l.*; the executor continues to keep the niece in the house, where he and the testator lived. The father of the child petitions, that she may be delivered to him. The child (of the age of 13) appears in court, and being examined, denies that she is under any restraint. The court of opinion that the guardianship of the child does by the law of nature belong to the father, but that the right thereto is not to be determined without a bill; that the father may take his child, but not by force, nor in her going to or returning from court; and that the father at all reasonable times may have access to the child.

*Quære whether a writ of ravishment of ward will lie, unless the defendant in the action takes away the ward? And as to a homine re-*

*pregiando and habeas corpus, (which last especially seems calculated only for the liberty of the subject;) if the parties brought up the case will acquiesce the court, that they are under no force, the court will let them go back to the places from whence they came; or if they appear to be under restraint, will set them at liberty, but not deliver them to the custody of another, nor in a proceeding of that nature, determine private rights as a right of guardianship evidently is; for then the parties would be concluded from any appeal or writ of error thereon. Possibly in an action de ejectione custodiæ the very right of guardianship might properly come in question. Rex v Smith, B. R. Trin. 7 & 8 G. o. 2. in notis.*

2. Children have a natural right to the care of their mother; and Lord *Hardwicke* ordered the grandfather, who was a defendant in the cause, to deliver them up to the mother, who was the plaintiff's wife. *Mich. 1737. Mellish v. De Costa, 2 Atk. 15.*

3. A guardianship of an infant, notwithstanding he marries, does not determine till his age of 21. *March 1747. Mendes v. Mendes, 3 Atk. 619.*

4. Application to compel a ward to return to school. The court said that the guardian is the proper judge at what school to place his ward; and the court will not indulge the infant in being put to a private tutor, or going to another school; and if he refuse to go, will take a proper course to compel him. As where a young man, having been placed at the university, absented himself and refused to return, Lord *Macclesfield* sent him back in the custody of his own tipstaff. *July 31, 1749. Hall v. Hall, 3 Atk. 721.*

5. The guardianship of daughters determines by marriage, but not that of the sons. *March 1747-8. Mendes v. Mendes, 1 Pef. 91. 160.*

6. On a question with whom a female infant of 17 years of age should reside, the court paid some attention to her inclination, the testamentary guardian having renounced, though the Chancellor, Lord *Hardwicke*, said he should have laid no weight on the desire of a scholar. An infant, where there is no testamentary guardian

## Guardian and Ward.

dian or mother, having socage land, may chuse a guardian at 12 if a female, at 14 if a male, and it is frequently done upon the circuit. *July 27, 1751. Anton. 2 Vef. 374.*

7. Upon petition by a father, who had been lately converted to the protestant religion, to have the guardianship of his son, which by his consent had been reposed in another person, upon attendance of all parties before the master in a cause instituted by the father and the son to establish the will of the grandfather, by which he had devised the guardianship to strangers, who refused to act: The court said, that there was no law to take a guardianship from papists; but the court could refuse to appoint them. Whereupon Sir Cordell Firebrace and Sir Robert Ladbroke, by consent, were appointed guardians, and the infant, whose relations were papists, was put to *Harrow* school; and it was ordered that none but protestants should have access to him; but the mother, who was a papist, was to see, and correspond with him under restrictions. *3d April, 1756. Blake v. Leigh, Amb. 308.*

14 Vin. 126. (Q. 3) Allowances. What Allowances he shall have.

1. THE allowance to be made for maintenance to a guardian must have regard to what the infant then had, and not to what may fall in afterwards, and till the contingency happens, shall not exceed the income of his original portion. *Trin. 1735. Chaplin v. Chaplin, 3 P. Wms. 368.*

2. The court, upon *ex parte* applications, may allow maintenance for infants, where no cause is depending. It is at the peril of the guardian in socage what he applies for maintenance; and the court said, the convenience in these applications is, the inducement to persons of worth to accept of the guardianship, in which case they have the sanction of the court for every thing they do on account of maintenance. *June 1742. Ex parte Whitfield, 2 Atk. 315.*

3. There being a borrowing and lending in the case of a mortgage, the real estate is considered only as a pledge, and the personal liable in the first place; but this rule has never been carried so far as to extend it to a provision in a settlement charged on real estates for maintenance for a child during her minority. *November 1744. Lanoy v. Duke and Dukes of Atbol, 2 Atk. 444.*

4. In the case of an elder brother, the court will direct the matter to make a larger provision for him, that he may be able, as the head of the family, to maintain younger brothers and sisters. *Ibid.*

5. The court will not direct interest for a contingent legacy, to be applied for the child's maintenance, unless from the poverty of the parent he is in danger of perishing for want. A parent must maintain his child, unless totally incapable, or by having many children, borders on necessity. *June 1743. Butler v. Freeman, 3 Atk. 60.*

6. In the case of a child, let a testator give a legacy how he will, either at 21 or marriage, or payable at 21 or marriage, and the child has no other provision, the court will give interest by way of maintenance. *July 9, 1744. Heath v. Perry, 3 Atk. 102. 716.*

7. Where maintenance is allowed, it is always paid to the father out of the child's estate; and there is no instance of its being deducted out of a legacy left by a father to the child. *Trin. 16 G. 2. Jefferies v. Jefferies, 3 Atk. 123.*

8. A grandfather is not bound to maintain a grandchild. *Roome v. Roome, 3 Atk. 181.*

9. Upon an application for maintenance for an eldest son, the court will make him a liberal allowance to enable him to maintain his brothers and sisters. *May 1747. Petre v. Petre, 3 Atk. 511.*

10. A father by will appoints his wife guardian of his eldest son till 21; a petition on the mother's behalf to confirm her guardian, and to be justified in what she should expend for maintenance. No instance where there is a *testamentary* guardian of the court's confirming it in this summary way, or sending it to a master to ascertain the allowance for the infant's maintenance: a bill is necessary for this purpose. *June 1747. Ex parte Richards, 3 Atk. 518.*

11. A guardian, before he had passed his accounts, brought an action against an infant for board; the court continued the injunction, which was prayed by the infant's bill, till the hearing, and said, in taking the account, the court would allow the guardian according to the maintenance allotted to the infant, to which the jury would have no regard. *March 1747. Anon. 3 Atk. 618.*

12. Where legacies are given, payable at a certain time, they carry no interest, for, till the day of payment comes, it is not demandable; but if given to a child, the court will allow it by way of maintenance. *May 1749. Hearle v. Greenbank, 3 Atk. 695.*

13. Where it appears that a guardian or a father is in distressed circumstances, the court will make a liberal allowance to infants. *Nov. 1748. Moach v. Garvan, 1 Vesf. 160.*

14. Testator, by his will, gave maintenance to his second son out of his real estate; he afterwards gives large legacies to his younger children, with maintenances out of the interest, the second son is intitled to both. *1782. Clive v. Walsh, 1 Bro. 146.*

15. Motion for an increase of allowance to an eldest son, and for a *special* direction to the master to consider the birth of a posthumous son; but the latter part of the motion was refused. *1782. Burnet v. Burnet, 1 Bro. 179.*

16. A second husband is not bound to maintain the children of the first, but shall have an allowance from the income of their fortunes. *1783. Billingsley v. Critchet, 1 Bro. 268.*

17. Maintenance not allowed by the court, where the parent is of ability to maintain his children, although directed by the will; and where he is reported not of ability, the sums allowed



shall be only from the time of the report, not of the decree. 1784. *Hughes v. Hughes*, 1 Bro. 387.

18. No allowance made to a parent for maintenance of the child for time past. July 1787. *Hill v. Chapman*, 2 Bro. 231.

19. On very particular circumstances the court will give maintenance for the time previous to the report. 1790. *Andrews v. Partington*, 3 Bro. 60.

20. The court will grant maintenance, though no cause in court. 1790. *Ex parte Rent*, 3 Bro. 80.

21. A guardian may be appointed and maintenance allowed without suit upon petition, and the costs allowed him in his accounts. March 1792. *Ex parte Slater*, 3 Bro. 500, and the Cases there cited.

22. No maintenance allowed where the parent is of ability to maintain his child. 1792. *Pulsford v. Hunter*, 3 Bro. 417.

23. Where there was no gift of the interest to legatees, and the testator has directed the money to be remitted in a way that he knew made interest, there is a very good ground for contending that they being infants are entitled to maintenance only. 1799. *De Mazanv. Pybus*, 4 Ves jun. 648.

14 Vin. 187.

#### (Q. 4) Guardian charged or favoured.

*Vide* (C. 2)

14 Vin. 202.

(B. a. 2) *Actions*. Proceedings in Actions or Suits by or against Infants suing or defending by Guardian, &c.

Where a defendant puts in an answer to a bill brought by an infant,

who does not reply to it, in such case it seems the answer must be taken to be true, in regard the defendant, for want of a replication, is deprived of an opportunity of examining witnesses to prove his answer; and he ought not to suffer for such omission of the plaintiff—in notice. See *quære*.

1. AN infant's answer cannot be given in evidence against him, because it is not the infant's answer but the guardian's, and the guardian is sworn and not the infant. Hil. 1733. *Wrottesley v. Bendish*, 3 P. Wms. 237.

2. A person who married a ward of the court clandestinely was restrained from proceeding in the ecclesiastical court on an excommunication against the infant or his guardian. Dec. 1737. *Hill v. Turner*, 1 Atk. 517.

3. Though a ward of the court be married with the consent of friends, there must be application in Chancery for increase of maintenance, and not in the ecclesiastical court. *Ibid*.

4. Where a mother secretes her children, who are infants, service of the subpoena upon her is sufficient, as she is the natural guardian of her children. Nov. 1744. *Smith v. Marshall*, 2 Atk. 70.

5. If

5. If an infant plaintiff does not reply to the answer, he is not affected by it, as he cannot admit any thing. *July 1742. Legard v. Sheffield, 2 Atk. 377.*

6. It was doubted by Lord *Hardwicke*, Chancellor, whether an infant, before he comes of age, can put in a new answer. *Bennet v. Lee, 2 Atk 487. Dec. 1742.*

7. But afterwards he may, and make a new defence. *March 1743. Ex parte Bennet, 2 Atk. 531.*

8. Where an infant brings a bill for land, and to have an account of the mesne profits, the court may elect him to proceed at law, and retain the bill for the mesne profits. *April 1744. Dormer v. Fortescue, 3 Atk. 130.*

9. Where a guardian has been guilty of ill practices in the prosecution of a suit to obtain a verdict, though it was not the act of the infant himself, yet the ill practice may be given in evidence. *July 1747. Caverly v. Dudley, 3 Atk. 544.*

10. An infant plaintiff is bound by a decree. *March 1747. Gregory v. Moleworth, 3 Atk. 626.*

11. An infant, after being of age, is not allowed by a new bill to dispute any thing that was done during his minority about maintenance. *March 1747. Gregory v. Moleworth, 3 Atk. 627.*

12. Money in the funds belonging to wards of the court, cannot be transferred into the name of the Accountant-General to the credit of the cause, until the account is taken before a Master, and his report made. *Hil. 1779. Bencroft v. Rich, 1 Bro. 56.*

13. An infant ought to sue by his next friend, and not to stay till he comes of age. *June 1790. Blake v. Bunbury, 1 Ves. jun. 194.*

14. Infancy in the defendant is no excuse for the plaintiff's delay. *1792. 2 Ves. jun. 12.*

15. An infant may be foreclosed. A decree may be had against him. He can do nothing but shew error. *Bishop of Winchester v. Beaver, 3 Ves. jun. 317. 1797.*

16. Copyhold lands were mortgaged in fee by lease and release as freehold; the customary heir is bound by a covenant for further assurance; but during the infancy the court refused to foreclose, and would go no further than direct the account, and that in default of payment the plaintiff should be let into possession, and hold and enjoy, till the heir should attain twenty-one, at which time he should surrender, and a day was given to shew cause against the decree. *Spencer v. Boys, 4 Ves. jun. 370.*

17. A motion for leave to answer by guardian must name the guardian. *Brassington v. Brassington, 2 Anstr. 369. Mich. 34 G. 2.*

24 Vin. 202.

(C. a) Restrained and punished in Equity.

1. **W**HERE any person enters upon an infant's estate, and continues the possession, this court considers him as a guardian, and will decree an account; and to be carried on after the infancy is determined, unless the infant, after being of age, waived such account: *Hil. 1737. Morgan v. Morgan, 1 Atk. 489.*
2. But the court will not appoint a receiver of an infant's estate without bill. *Anon. Ibid.*
3. It is improper for a guardian to purchase an infant's estate immediately upon his coming of age; but if the guardian pay the full consideration, it is not voluntary, and cannot be set aside. *Oldin v. Samborne, 2 Atk. 15. Mich. 1737.*
4. Whoever enters on the estate of an infant, enters as guardian. *April 1744. Dormer v. Fortescue, 3 Atk. 144.*
5. The procuring releases from a person immediately after his coming of age, suspicious; but if no fraud, and the accounts settled at the time, they will not be set aside. *Steadman v. Palling, 3 Atk. 424. Feb. 1746.*
6. Where a guardian, on settling his accounts as soon as the infant came of age, accepted a present from the infant, the court set it aside, as dangerous. *April 1715. Oldham v. Hand, 2 Vef. 259.*
7. The court may give extra-judicial directions on behalf of infants; as where a stranger complained to the court of the guardian, and abuse of the infant's estate, the court, upon the stranger's undertaking to pay costs, referred the receiver's accounts to the Master, to see whether the infant was wronged or not. *July 1752. Earl of Pomfret v. Lord Windsor, 2 Vef. 484.*

24 Vin. 202.

(D. a) Offences by Strangers, with regard to the Ward. How punished, and in what Cases.

1. **M**ARRYING an infant ward of the court is a contempt, though the parties concerned in such marriage had no notice that the infant was a ward of the court; for acts of the court, as the commitment of a wardship, and in a cause depending, are to be taken notice of by every one at his peril. *Trin. 1731. Herbert's case, 3 P. Wms. 117, 118.*

*One not a freeman of London, married a city orphan, and though it did not appear that he had any notice of her being a city orphan, yet held such person was punishable by the court of orphans. 3 Lev. 32. 1 Vent. 178. Ren v. Harwood. Note to the above case.*

2. The person who gave away an infant a ward of court at her marriage, was committed: and it was said *per Lord Hardwicke Ch.* that to make persons liable for contempt of court, for being concerned in marrying one of its wards, such person must be concerned

concerned in the original contrivance, and be apprised of her being a ward of court. *More v. More*, 2 Atk. 157. April 1741.

3. A mother petitioned, that Mr. Barry might be restrained from marrying her daughter, being an infant, and a ward of this court; his lordship ordered, as Mr. Barry was likewise an infant, that his guardian should not permit him to marry the young lady without leave of the court. *Murch* 1745. *Smith v. Smith*, 3 Atk. 304.

4. It is a contempt to marry a ward of the court without leave, though the father of the infant be living, or there be a testamentary guardian. The mere filing a bill is sufficient to make an infant a ward of court. *April* 1756. *Butler v. Freeman*, Amb. 301.

5. The personal attendance of a man who ran off with a ward of the court, was dispensed with, he being in the army, and offering to go before the master and make a settlement. *March* 1763. *Green v. Pritzer*, Amb. 602.

6. There must be a reference to a Master for a proper settlement, before a contempt for marrying a ward of court can be cleared: in such case, a settlement of the wife's personal property upon husband for life, then to wife for life, then to children according to appointment of survivor, varied, so as to vest a moiety in the children at her death, if before his, but still subject to his appointment. *June* 1790. *Stevens v. Savage*, 1 Ves. jun. 154.

7. Husband committed for marrying a ward of court, and discharged under particular circumstances on undertaking to make a settlement, was held to that, and not permitted, upon her consent, to receive her whole fortune. 1796. *Stackpole v. Beaumont*, 3 Ves. jun. 89.

8. A husband is entitled to the income of his wife's equitable interest, unless he has received some fortune with her; or has misbehaved, as by running away with a ward of the court. 1798. *Macaulay v. Philips*, 4 Ves. jun. 15.

9. Upon a proposal for a settlement, under a commitment for marrying a ward of the court, a power was directed to be inserted, enabling the wife to settle the interest of a moiety of her fortune upon any future husband for life. The husband, undertaking by his counsel to execute such settlement, was discharged. 1798. *Wink v. James*, 4 Ves. jun. 386.

[D]  
24 Vin. 205.

## Guernsey, Jersey, and the Isle of Man.

1. **THE** *Isle of Man* is not part of the realm of *England*, but parcel of the king's crown of *England*, held as a feudatory dominion, by liege homage of the kings of *England*. *Earl of Derby v. Duke of Athol*. T. 1751, 2 Vef. 337.

2. A question, relating to the right and title to the *Isle of Man*, may be determined in *England*, in chancery, the king's bench, or before the king in council. *Earl of Derby v. Duke of Athol*. Hil. 1748. 1 Vef. 202.

3. By letters patent 7 J. 1. a grant was made by the crown of the *Isle of Man*, and of all the rectories and tithes, by name, to *William* Earl of *Derby* for life, to his wife for life, to their son *James* Lord *Stanley* in fee, to be held of the king by liege homage, rendering immediately after that homage two falcons, and so to his successors every coronation-day two falcons: this is a socage tenure, and (*semb.*) petty serjeanty. *Earl of Derby v. Duke of Athol*. T. 1751. 2 Vef. 337.

4. By private act of parliament, 7 J. 1. *William* Earl of *Derby*, and his wife for life, and the longest liver; then their son *James*, and the heirs male of his body; then *Robert Stanley*, and the heirs male of his body; then the heirs male of the body of *Earl William*, then the right heirs of *James* Lord *Stanley*; shall hold against the king, &c. and against the widow and daughters of *Earl Ferdinand* (*Earl William's* elder brother), all the *Isle of Man*, with the appurtenances; and neither *James*, nor the heirs male of his body, nor *Robert*, nor the heirs male of his body, nor any of the heirs male of *William*, shall have power to alien it, but it shall continue as above limited; only they may make leases, as tenants in tail do in *England* by stat. H. 8.

5. In 1666, *Charles* Earl of *Derby* makes a lease for 10,000 years of the rectories and tithes in *Man*, for the benefit of the poor clergy; and by deed, as collateral security, conveys lands in *Lancashire*, in trust, to permit him and his heirs to hold said lands and receive the rents, till interruption in receipt of the rectories and tithes by him, or those claiming under him or his ancestors, and then to enter and receive.

6. In 1735, *James* Earl of *Derby* (heir male of *James* Lord *Stanley*, in the grant and act mentioned) devises to *Sir Edward Stanley* (who, on his death, became Earl of *Derby*, and his heirs for ever) all his honours, real estate, and hereditaments, whatsoever and wheresoever.

7. In

7. In this *James* ended the male line of Earl *William*.

8. The devise in 1735 was void, by force of the private act of parliament, whereupon the *Isle of Man* descended to *James* Duke of *Atbol*, as right heir of *James* Lord *Stanley* (afterwards Earl of *Derby*, beheaded at *Bolton* in *Lancashire* in 1651), being his great grandson by *Charlotte* his third daughter.

9. The lease of the rectories and tithes was also void, and the trustees were entitled to the rents of the lands in *Lancashire*, from the time the tithes were evicted by the Duke of *Atbol*. *Earl of Derby v. Duke of Atbol*. T. 1751. 2 Ves. 337.

10. By stat. 5 G. 3. c. 20. in consideration of 70,000*l.* to the Duke and Dukes of *Atbol*, the island, castle, pele, and lordship of *Man*, and all royalties, &c. are unalienable in his majesty; except the land-property rights, as lord of manors, patronage of bishopric, &c.

11. By stat. 5 G. 3. c. 30. bounties on corn exported from *Britain* or *Ireland* to *Man*, are discontinued.

12. Stat. 5 G. 3. c. 39. provides against smuggling with the *Isle of Man*.

13. Stat. 5 G. 3. c. 43. permits importation of several commodities of *Man*, and grants bounties on linens made in *Man*, and exported from *Britain*.

14. Stat. 6 G. 3. c. 50. extends the act 29 *Car.* 2., relating to taking affidavits in the country, to the *Isle of Man*, and empowers the king to appoint ports therein for landing and shipping goods.

15. Stat. 7 G. 3. c. 45. encourages and regulates the trade and manufactures of *Man*.

16. Stat. 11 G. 3. c. 52. provides for repairing the harbours in *Man*.

17. Stat. 12 G. 3. c. 58. is for encouraging the herring fishery of *Man*.

18. The royal court of *Jersey* cannot transmit a cause to the king for difficulty, but must proceed to judgment. *Magoons v. Dumaresque*, 2 *Ld. Raym.* 1448.

19. By 9 G. 3. c. 28. *Jersey* and *Guernsey* may export to *America*, directly, goods necessary for the fishery; and import non-enumerated goods, except rum.

## Heir Looms.

[D]  
24 Vin 291.

*S. F.* devised all his books, pictures, and household goods to such male person when he should attain 21, who should then be entitled to the trust or possession of his real estates before devised, and till then directed they should be kept at *Dunton Hall*, and be used in the mean time by such male person residing there, declaring

**Heir Looms.**

declaring it to be his will and desire that they might go in the nature of heir looms with his estate, and be used therewith, as long as the laws of this realm would permit. Decreed by Lord C. *Hardwicke* that the testator's pictures, books, and household goods ought to be considered as heir looms and to go along with his real estate, as far as by the rules of law or equity they may, for the devise here is a disposition only of the use, until some person, entitled to the inheritance, shall come into possession by attaining 21. *Trafford v. Trafford*, 3 Atk. 347. See *Toller's Law of Executors*, 151.

[ D ]  
 24 Vin 293.

**Hereditament.**

See *Doe v. Richards*, stated in Suppl. tit. *Devise*, (S. a), ante.

24 Vin. 294.

**Heriot.**

24 Vin. 296.

(A. 4) Payable. In what Cases. By Custom.

A Custom for the homage to assess a compensation in lieu of a heriot, to be paid by an incoming tenant on surrender or alienation, seems not to be good. *Per Buller & Heath J. Dub. Eyre C. J. & Rooke J. Parkin v. Radcliffe*, 1 Bos. & Pull. 282.

24 Vin 298.

**(E) Remedy for them.**

1. IF an heriot be reserved by deed since the stat. *Quia Emptores*, payable by tenant in fee, it will be considered as rent, and then the landlord cannot seize, but must either distrain or bring an action for non-payment. *Edwards v. Stanley*, *Willes' Rep.* 192.

2. Plaintiff declared for taking and distraining an ox. Defendant avowed the taking as a seizure for a heriot (claiming no right to distrain). On a question whether defendant, after a nonsuit, was entitled to double costs under 11 G. 2. Held not. The avowry not being for taking the ox as a distress is out of the statute; for heriot service, cattle, &c. are distrainable; for heriot custom, not. *Lloyd v. Winton*, *Barnes*, 198.

## Holding over.

[ G ]

### (A) Holding over a Term, &c.

14 Vin. 304.

*Vide Finer, tit. Rent. (G. c) and Supplement, same title.*

## Homine Replegiando,

[ G ]

(C) Proceedings, Pleadings, and Returns ; and in 14 Vin. 305.  
what Cases the Party shall be bailed ; and of the  
Difference between this Writ and a common  
Replevin.

1. **A** *homine replegiando* being brought against the defendant for the wife of the plaintiff, an *alias* and *pluries* issued thereupon ; to the last of which writs the defendant appeared : notwithstanding that, a *capias in withernam* was issued against defendant, which was held to be irregular, and therefore all process thereon was stayed.

The wife of the plaintiff having died after the defendant's appearance, it was moved, that all proceedings in this action be stayed. *Sed per Curiam*, " It is too much for us to stay this suit upon a motion, and therefore let the plaintiff declare, and the defendant may by pleading take what legal advantage he can." *Saunders v. Fortescue, B. R. Mich. 23 G. 2. 1 Wils. 256.*

## Honours.

[ D ]

14 Vin. 319.

*Vide Peers, post.*



[ D ]

24 Vin. 313.

## Hospitals.

See 2 Suppl. tit. *Charitable Use.*

[ G ]

## House of Correction.

24 Vin. 321.

(A) Erected how, and for what Purposes.

1. A Woman was committed by several justices of the peace, being taken on a general privy search, and charged on oath to be a loose, idle, and disorderly person; and the commitment required her to be kept to hard labour till the first day of the next general quarter sessions: and upon consideration of all the statutes relating to this matter, the commitment was held to be good, and the prisoner remanded. *Mary Freeman alias Talbot's Case. Mich. 4 G. 2. Stra. Rep. 882.*

2. By 15 G. 2. c. 24 it is enacted, "That in all cases, where any person, liable by law to be committed to the house of correction, shall be apprehended within any liberty, city, or town corporate, whose inhabitants are contributory to the support and maintenance of the house or houses of correction of the county, riding, or division in which such liberty, city or town corporate is situate, it shall and may be lawful for the justices of the peace of such liberty, &c. to commit such person to the house of correction of the county, &c.; and such person shall be dealt with in the same manner as if committed by any justice of the peace for the said county, &c."

3. By 17 G. 2. c. 5. s. 31. it is enacted, "That the justices of the peace for any county, riding, city, borough, town corporate, division, or liberty, at their general or quarter sessions, shall from time to time take effectual care that the houses of correction already provided, or hereafter to be provided, within the limits of their respective jurisdictions, except such houses of correction as have been, or shall be erected or maintained by any particular founder or founders, shall be duly fitted up, furnished, and supplied with sufficient implements, materials, and furniture, for keeping, relieving, setting to work, employing, and

" and correcting all idle and disorderly persons, rogues, vagabonds, incorrigible rogues, and others who shall be sent to, confined, or continued in the same; and two of the justices of the peace are required to visit the same twice, or oftener, if need be, in every year, and to examine into the estate and management thereof, and to report the same to the next general or quarter sessions, to the intent that if any thing be amiss therein, the same may, by order of such general or quarter sessions, be reformed and amended."

4. By *sect. 32.* it is further enacted, " that where any offenders shall be committed to the house of correction, by virtue of any law now in being, or hereafter to be made, and the time and manner of their punishment is not expressly limited, directed, and appointed, the said justices shall commit such offender to the house of correction, there to be kept to hard labour, until the next general or quarter sessions, or until discharged by due course of law; and it shall and may be lawful for two justices (of which the justice who committed such offender to be one) to discharge the said offender before the said sessions, if they see cause; and if he shall not be so discharged, the said sessions may either discharge him, or continue him in custody for such time as they shall see fit, not exceeding three months."

5. By *sect. 33.* it is enacted, that " the justices of the peace at the general or quarter sessions, may and shall cause such sums of money as shall be necessary for all or any of the purposes in the said act mentioned, to be raised in the same manner as rates are directed to be raised by an act made in the twelfth year of the reign of his present majesty, intituled "*an act for the more easy assessing, collecting, and levying of county rates.*"

6. By *22 Geo. 3 c. 64. s. 1.* it is enacted, " that the justices of the peace in every county, riding, division, city, liberty, and precinct, within *England* and *Wales*, at their respective quarter sessions of the peace to be held next after *Midsummer*, shall nominate one or more justice or justices of the peace within their respective jurisdictions, to examine and inspect the several houses of correction within their respective jurisdictions, and the justice or justices so to be nominated, is and are hereby required carefully and diligently to inspect the same, and to report his or their opinion to the justices at the *Michaelmas* quarter sessions then next following as to the state and condition thereof, and the increase of number, or additions, or alterations which they may judge necessary to make them more convenient and useful; and the said justice and justices is and are hereby required to employ proper and skilful persons to make plans and estimates of new buildings, or the additions or alterations which he or they shall think necessary; which plans, together with the report, shall be laid before the court at the said *Michaelmas* quarter sessions; which court is hereby authorised and required to consider the same, and if they approve of

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" such

By *24 G. 3. sess. 2 c. 56.* it is enacted, that justices who have omitted to inspect into the state of the houses of correction and report the same, as directed by *22 G. 3. c. 64. s. 1.* may do it at the next or any subsequent quarter sessions of the peace.

## House of Correction.

“ such plans, they may contract with such persons whom they  
 “ shall think most proper to do the same; or if they disapprove  
 “ such plans or estimates, to direct such others to be made as  
 “ they shall think fit; and the justices, in settling and adjusting  
 “ such plans, are hereby required to provide separate apartments  
 “ for all persons committed upon charges of felony, or convicted  
 “ of any theft or larceny, and committed to the house of correc-  
 “ tion for punishment by hard labour under or by virtue of the  
 “ laws in being, in order to prevent any communication between  
 “ them and the other prisoners, and also proper apartments, co-  
 “ vered or open as shall be found most convenient for employing  
 “ the several persons to be kept to hard labour; and they are  
 “ also to provide separate apartments in each division of the said  
 “ house of correction, for the women who shall be committed  
 “ thither.”

7. By *sect. 8.* it is further enacted, “ that no person who shall be  
 “ governor or keeper of any house of correction, or who shall have  
 “ any office or employment as assistant, or otherwise, under such  
 “ governor or keeper, shall sell, or be capable of being licensed to  
 “ sell, or have any benefit or advantage whatsoever, directly or  
 “ indirectly, from the sale of any wine, ale, beer, spirituous or  
 “ other liquors, or any other article, matter, or thing used in such  
 “ house of correction, or by any person or persons confined there-  
 “ in during the time of such employment:” under the penalty  
 “ of ten pounds, and to be dismissed from his employment; and  
 “ that “ no wine, ale, spirituous or other liquors shall be brought  
 “ into the house of correction to be drank there, unless for a  
 “ medical purpose, by a written direction under the hand of  
 “ the apothecary or surgeon usually attending such house of  
 “ correction.”

8. By 24 *Geo. 3. sess. 2. c. 55. s. 2.* it is enacted, “ that where  
 “ it shall appear that the amount of any estimate approved by the  
 “ justices for the building, rebuilding, enlarging, or removing  
 “ and fitting up any house of correction, under the powers of  
 “ this act, shall exceed one half of the amount of the ordinary  
 “ annual assessment for the county rate, that then and in such  
 “ case it shall and may be lawful for the justices of the peace,  
 “ within the respective limits of their commissions, so assembled  
 “ in their quarter sessions, from time to time to borrow, and take  
 “ upon mortgage of the rates herein mentioned, any sums, not  
 “ less than fifty pounds, nor exceeding one hundred pounds  
 “ each.”

And by *sect. 3.* the justices are authorised and required not  
 only to charge the said rates, with the interest of the monies so  
 borrowed, but also with the payment of a further sum, equal at  
 least to the sum so charged for the interest of the securities men-  
 tioned in the said act.

By *sect. 5.* it is further enacted, “ that in cases where such  
 “ houses of correction shall be pulled down, repaired, rebuilt, or  
 “ enlarged, it shall be lawful to and for the said justices, in their  
 “ quarter

## House of Correction.

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“quarter sessions assembled, to sell and dispose of the materials  
“of such old houses of correction, or such parts thereof, and  
“also of the whole, or such parts of the scite or ground belong-  
“ing thereto, as shall not be necessary to be used for, or in the  
“rebuilding, repairing, or enlarging, such houses of correction,  
“at the best price or prices that can be gotten for the same;  
“which monies shall be applied to the purposes of this act; and  
“in case of any such purchase of lands, tenements, or heredita-  
“ments, which shall exceed what is necessary to be so used or  
“employed, the said justices may sell and dispose of the same,  
“and apply the money to be raised by such sale for the purposes  
“aforesaid.”

By *sect. 12*. it is further enacted, “that in all cases where any jus-  
“tice or justices of the peace is or are, or shall be, by any act of  
“parliament, authorised or empowered to convict any person be-  
“fore him or them in a summary way, without the intervention of  
“a jury, it shall be lawful for such justice or justices of the peace,  
“if he or they shall think fit, to commit such person so con-  
“victed to the house of correction within his or their jurisdic-  
“tion, in lieu or instead of the common jail.”

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## Habeas Corpus.

[G]

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(C) What it is, and how granted, and by whom. 14 Vin. 218.

A *Habeas Corpus ad subjiciendum* must be awarded on motion,  
but a *babeas corpus ad satisfaciendum*, &c. is granted of course.  
*Penrice and Wynne's Case*, *E. T.* 30 *Car. 2.* *C. B.* 2 *Mod.* 306.

(C. 2) By what Court granted.

14 Vin. 218.

1. *C. B.* has a general jurisdiction to grant it in all cases whatso-  
ever. *Wood's Case*. *Hil.* 11 *G. 3.* *C. B.* 3 *Wilf.* 172. and  
vide 2 *Bl. Rep.* 745.

2. In civil cases, it is a judicial writ issuing out of the king's  
bench office. *Ballard v. Bennett*, *E.* 32 *G. 2.* *B. R.* 2 *Burr.*  
777.

3. By 16 *Car. 2. c. 10.* If any person shall be committed by the  
privy council, either the court of king's bench or common pleas  
may grant a habeas corpus.

D 2

4. By

## Habeas Corpus.

4. By 31 *Car. 2. c. 2.* either the court of king's bench or common pleas in *term time*, and any judge of the said courts or baron of the exchequer in *vacation*, may award a habeas corpus for any prisoner whatsoever.

24 Vin. 212.

## (D) In what Cases.

1. It will be granted for detaining a child under age from her father. 1 *Bl. Rep.* 386.

2. A man impressed under a press act, who is not in custody (either as having absconded, or as being promoted to be a corporal), cannot bring habeas corpus, but the court will, on motion, grant a rule to the commissioners for putting the act in execution, to shew cause why he should not be discharged. *Rex v. Dawes. T. 31 G. 2. B. R. 1 Burr.* 636.

3. The stat. 6 & 7 *W. 3. c. 18. f. 19.*, which allows to the master of every ship, engaged in the coal trade, two seamen free from impressing, is still in force; and if the master nominate those seamen before the ship sail, and they are afterwards impressed, the court of *B. R.* will grant an habeas corpus to the officer impressing them, to bring them up that they may be discharged. *Ex parte Dryden. M. 34 G. 3. 5 T. R.* 417. *But vide ex parte Galilee. T. 38 G. 3. 7 T. R.* 673., *contra*.

4. For a wife. *Rex v. Mary Mead. E. T. 31 G. 2. B. R. 1 Burr.* 542. 4 *Ibid.* 1991.

5. For a young lady who had been decoyed from her father; but now desired to continue with him. *Rex v. Clarke. T. 31 G. 2. B. R. Ibid.* 606.

6. To the keeper of a private mad-house to bring up one confined therein. *Rex v. Clarke. M. 3 G. 3. B. R. 3 Burr.* 1352.

7. To produce an infant. *Rex v. Sir F. B. Delaval. Ib.* 1436.

8. The court of common pleas may grant a habeas corpus to bring up the body of a prisoner, committed by a justice of peace for refusing to give surety for his good behaviour, pursuant to the directions of a penal statute. *Jones's Case. Hil. 28 & 29 C. 2. C. B. 1 Mod.* 235.

24 Vin. 215.

(D. 3) Directed to whom, *ad faciendum*.

1. It must be directed to the officer in whose custody the prisoner is detained. *Stat. 31 Car. 2. 2.*

2. And therefore if to the sheriff or gaoler it is bad. *Anon. T. 12 W. 3. B. R. 1 Salk.* 350.

## (E. 2) To what Place.

14 Vin. 217.

1. **TO** the cinque-ports. *Anon. M. 21 C. 2. B. R. 1 Mod.*  
20.
2. To the governor of *Jersey* and *Guernsey*. 1 *Sid.* 386.
3. To every inferior court. 4 *Com. Dig.* G. 1.

## (F) Returns. How and what. In general.

14 Vin. 217.

1. **ON** a habeas corpus granted by a judge in vacation, returnable immediate before himself at his chambers, the party may be brought into court in term. *Rex v. Dr. Shebbeare. H. 31 G. 2. 1 Burr.* 460.
2. If the court of aldermen commit a freeman, by warrant in writing, for refusing to take up his livery, the gaoler, in making a return to a habeas corpus, must set forth the warrant at large. *The Company of Vintners v. Clarke. H. 7 W. 3. B. R. 5 Mod.* 156.
3. Whilst the return is debating, the party may be bailed. *Rex v. Bethill. E. 7 W. 3. B. R. 5 Mod.* 23.
4. If a person come in on habeas corpus and give bail, yet, if it be not at the return of the process, he cannot give rules, but must wait two terms, and then, if there be no declaration, he shall be discharged on common bail. *Hothershell v. Bowes. M. 1 Ann, B. R. 6 Mod.* 22.
5. When a person is brought up by habeas corpus, the return shall remain in court, and a copy of it only shall be given to the marshal. *Anon. T. 3 Ann, B. R. Ibid.* 180.
6. Where the writ is returnable at a day certain, the person can only be brought up then, *aliter* if returnable immediately. *Anon. M. 13 W. 3. B. R. 12 Mod.* 564.
7. On good cause shewn, the court will enlarge the time to return. *Rex v. Clarke. M. 3 G. 3. 3 Burr.* 1362.
8. But when the commitment is for treason or felony, plainly expressed in the warrant, the officer is not obliged by the stat. 31 *Car. 2.* 2. to make a return as directed by that statute.
9. The court will not receive the return till the return day. 2 *Bl. Rep.* 805.
10. The old rule of court, made *Michaelmas* term 1654, directing the habeas corpus to be made returnable in court at a day certain in term, unless directed to the sheriffs of *London* or *Middlesex*, or unless it be to deliver over the defendant in discharge of his bail, is fallen into disuse, and the writ is now made returnable before the chief justice at his chamber immediate, and should be returned in due and convenient time. *Vide Dr. Bettefworth v. Bell. E. 6 G. 3. B. R. 3 Burr.* 1875.

24 Vin. 218. (F. 2) Returns thereof. Good or not; and Exceptions to Returns of Commitments.

1. **V**IDE stat. 31 Car. 2. c. 2.

2. A constable is an officer within the meaning of the above statute, and obliged to give copy of warrant of commitment. *Hudson v. Ash. E. 5 G. 1. B. R. 1 Stra. 167.*

3. The officer must shew, by his return, by whom the party was committed, and the cause of commitment. 2 *Inst. 55.*

4. The return ought to shew the cause of commitment specially and certainly. 2 *Inst. 55.*

5. And therefore if the return be, *that he was committed for a contempt in not performing an order between A. and B. made on 3d May*, it is good. 4 *Com. Dig. E. 2.*

6. The return to a habeas corpus cannot be supplied by affidavits. *Rex v. Smith, T. 7 G. 2. B. R. 7 Mod. 234.*

7. Return to a habeas corpus, that he was committed to the gaoler; and returns the order, which was that *remaneat in custodia* till he paid a fine of 100*l.*; though the return be not good, yet there is a good judgment returned; so not discharged. *Rex v. Bytbell. T. 7 W. 3. B. R. 12 Mod. 74.*

8. Commitment by secretary of state good, but the species of treason must be expressed, else ill. *Rex v. Row and Kendall. B. 82.*

9. Return, that he was committed to the keeper of *Newgate* by the court of aldermen, not good, because it does not appear that he was an officer of the city; though the court in fact know he is so, yet they cannot judicially take notice of it. *Rex v. Clarke. B. 113, 114.*

10. To habeas corpus to an inferior court, connuance of pleas is no good return. *Taylor v. Rignold. H. 13 W. 3. B. R. 12 Mod. 666.*

11. When a man is committed for any crime, either at common law or by act of parliament, for which he is punishable by indictment, a return, *that he was committed by due course of law*, is good. But if the commitment be in pursuance of a special authority, the terms of the commitment must be special, and exactly pursue the authority; and therefore if it do not appear on the return to have been according to that authority the return will be bad. 2 *Bl. Rep. 8c6.*

12. If the return shew a good cause of commitment, it will be good, although it wants form, as if the return says, *that it was awarded in court quod remaneat in custody for a fine*, without saying *quod committitur pro fine*. *Rex v. Bethill. E. 7 W. 3. B. R. 5 Mod. 24.*

13. Return, "That at the coming of the writ, defendant was not in the keeper of the prison's custody," is good. *Rex v. Bethuen. M. 12 G. 2. B. R. Andr. 281.*

14. "That

## Habeas Corpus.

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14. "That before the coming of the writ, defendant was discharged out of his custody by an order of sessions," without saying what sessions, what order, or that he was discharged by due course of law, good, for the purpose of filing the writ. *Ibid.*

15. To a habeas corpus, directed to the king's messengers, it seems a good return, that at the time of the coming of the writ, or at any time since, he was not in their custody. *Semb. Rex v. Wilkes. E. 3 G. 3. C. B. 2 Will. 154.*

16. A return is bad if it do not shew an express and certain cause of commitment. As if a return be, *that he was committed for aiding the escape of one for high treason*, without saying what species of treason, it is bad. *The Case of Kendall and others. M. 7 W. 3. B. R. 5 Mod. 83.*

17. The defendant was committed by two justices of peace, for that he, being overseer of the poor, had not accounted as by statute directed, and had not accounted before them, is bad; he might have accounted before others. *Rex v. Gibson. Fort. 272.*

18. The following return to an habeas corpus, "I had not, at the time of receiving this writ, nor have I since had the body of *A. B. detained* in my custody, so that I could not have her before, &c." held insufficient, because it was evasive. *Rex v. Winton. M. 33 G. 3. 5 T. R. 89.*

19. Yet the default of an averment of a fact in a return may be amended in court. *Per Hale. Anon. M. 25 Car. 2. 1 Mod. 103.*

20. Commitment by commissioners of bankrupt, till the defendant conform to their authority, ill. *Bracy's Case, 1 Salk. 348.* *Vide Str. 880. 2 Bl. R. 806.*

1141. 2 Hawkins, c. 16. s. 18., and notes to said section in 6th edit., where it is stated that commitments grounded upon acts of parliament must pursue the conclusions which the statutes prescribe. And where a man is committed as a criminal, the conclusions must be, *until he be delivered by due course of law*. If he be committed for contumacy, it should be, *until he comply*.

21. If a return be insufficient, an *alias habeas* shall be granted, and the officer shall be amerced. *Anon. 12 Will. 3. 1 Salk. 350.*

22. If no return to the *alias*, or a bad one, an attachment will be granted. *Id.*

### (H) Effect. Or what removed,

14 Vin. 216.

1. **A** Defendant may cause himself to be removed from any civil custody into that of the marshal.

2. **A** prisoner, removed into the custody of the marshal by habeas corpus, cannot be removed elsewhere till he has answered to the cause here. *Anon. M. 11 W. 3. B. R. 1 Salk. 350.*

3. *Habeas corpus ad testificandum* lies to remove a prisoner in execution, yet where it appears to be a contrivance, the court will not grant it. *Rex v. Burbage. T. 3 G. 3. 3 Burr. 1440.*



24 Vin. 227.

## (I) Obeyed. How it must be obeyed.

1. **A** Writ of habeas corpus, if not signed by a judge, need not be obeyed. *Rex v. Roddam. M. 18 G. 3. B. R. 2 Crofs, 672.*

2. A writ of *habeas corpus ad testificandum*, to bring up a sailor on board a ship, who is not detained there as a prisoner, ought not to be granted without an affidavit that he has been served with a subpoena, and is willing to attend. *Ibid.*

3. The court will not direct a person to be turned over on habeas corpus till the gaoler's fees be paid. 2 *Hawk. P. C. 151. f. 31. And vide 1 Burr. 443.*

Opinion of  
Fortescue, J.  
Crompton v.  
Ward, 1 Str. 433. *videtur contra; sed vide.*

4. Officer must obey the writ, though fees unpaid. *Hopman v. Barber. M. 2 G. 2. B. R. 2 Stra. 814.*

5. The court will require a return to be made to the first writ of habeas corpus, without issuing an *alias* or a *pluries*, and if the first writ be not obeyed an attachment will immediately issue. *Rex v. Winton. M. 33 G. 3. 5 T. R. 89.*

6. If habeas corpus is not returned, attachment *nisi* shall go without rule to return. *Rex v. Wright. M. 5 G. 2. Stra. 915.*

7. If habeas corpus is not obeyed, the court will grant attachment even against a peer: for he has no privilege against the process of *Westminster-hall* to compel obedience to habeas corpus. *Rex v. E. Ferrers. T. 31 G. 2. 1 Burr. 631.*

8. And the return ought to be made within three months, 1 *Sid. 78.*

[ F ]

## Hearing.

24 Vin. 233.

## (A) Of setting down a Cause for Hearing.

**T**HE course of the court is, upon default of plaintiff or defendant appearing to hear judgment when the cause is called, and an affidavit of service to hear judgment is wanting, to strike the cause out of the paper, without costs to either party. *Hind, Cn. Practice, 407.*

(B) Manner of *proceeding* to, and at what Time the <sup>14 Vin. 234.</sup>  
Hearing may be.

Vide *Practical Register*.

(C) What may be read.

<sup>14 Vin. 235.</sup>

1. **T**HOUGH a bill in chancery cannot be read at law, yet it may be read in chancery. 1 *Atk.* 65. *June* 1737. *Metcalfe v. Ives*.

2. Parol evidence, though improper when offered against the legal operation of a will, or an implied trust, admitted, where it was to support the law and the equity too. 1 *Atk.* 386. *July* 1737, *Taylor v. Taylor*.

3. Parol evidence of a father's declarations not allowed to debar a child of her orphanage share; but proofs of declarations by the husband, as to an advancement in marriage with the daughter of a freeman, admitted; evidence also of the declarations of the wife, made during the coverture of her first husband, admitted to be read against the second. 1 *Atk.* 407. *March* 1741. *Trawbner v. Watts*.

4. Where an original note of hand is lost, and a copy of it offered in evidence, you must shew that the original note was genuine, before the copy can be read. 1 *Atk.* 446. *Mich.* 1737. *Goodier v. Lake*.

5. Bill to set aside an assignment of leasehold estate, and suggesting that it was not intended to be an absolute assignment, but subject to a trust for the plaintiff's benefit; though no express trust in the deed, yet as it might be collected from circumstances arising out of the assignment itself, inconsistent with an absolute assignment, parol evidence was admitted to explain the transaction. 1 *Atk.* 447. *March* 1737. *Hutchins v. Lee*.

6. There cannot be parol evidence of a trust since the stat. 29 C. 2., yet it is admitted to avoid a fraud. *Ibid.*

7. Parol evidence not admitted to add a legacy to a will. 1 *Atk.* 448. *July* 1739. *Whitton v. Ruffel*.

8. Though a wife be a defendant, and charged with fraud and malpractice, yet the evidence of the husband shall be admitted where the interest of a third person is concerned. 1 *Atk.* 451. *Trin.* 1738. *Cotton v. Lutterell*.

9. Where two leases are set up, one of them cannot be read till possession has been proved under it, for the rules of evidence are the same in equity as at law. 1 *Atk.* 453. *Mich.* 1737. *Manning v. Lechmere*. And 2 *Atk.* 48. *Henley v. Phillips*; S. P. and 228, S. P.

## Hearing.

10. Parol evidence not admitted to prove testator's intention to dispose of a sum of money under a power. 1 *Atk.* 558. 1739. *Molton v. Hutchinson.*

11. The bare entry of a steward in his lord's contract book with his tenants is not evidence of *itself*, that there is an agreement for a lease between the landlord and tenant. 1 *Atk.* 497. March 1788. *Charlewood v. Duke of Bedford.*

12. A copy of admittance may be read, though not signed, where it is of 30 years standing. 2 *Atk.* 45. July 1740. *Dean and Chapter of Ely v. Sir S. Stewart.*

13. Where a witness, who attested a deed, is dead, he must be proved to be so. 2 *Atk.* 48. July 1740. *Henley v. Phillips.*

14. Where a witness has lived abroad, a strict proof of his death is necessary, otherwise where he has lived constantly in England. *Ibid.*

15. A criminal conviction against the husband cannot in a civil suit be read against the wife. 2 *Atk.* 64. October 1740. *Hanbury v. Lord Bateman.*

16. A conviction of recusancy cannot be read against a third person under the 11th & 12th *W. & M.*, but the facts must be proved. *Ibid.*

17. Parol evidence admitted to shew a trust from the mean circumstances of the pretended owner of the real estate. 2 *Atk.* 71. November 1740. *Willis v. Willis.*

18. A counterpart may be read, if an original deed is lost, and if no counterpart, a copy, and if no copy, parol evidence of the manner of its being lost; if destroyed by fire, or lost by any unforeseen accident, they are sufficient excuses. 2 *Atk.* 71. November 1740. *Villiers v. Villiers.* 2 *Atk.* 541. April 1743. *Harvey v. Phillips, S. P.*

19. Where there was a written agreement, the defendant was allowed to read parol evidence to rebut an equity set up by the bill. 2 *Atk.* 99. December 1740. *Walker v. Walker.*

20. Evidence of an exemption from tithes depends on usage, and a *posterior* usage is evidence of an anterior, for no other can be had. 2 *Atk.* 136. February 1740. *Archbishop of York v. Sir Miles Stapleton.*

21. A bill for quit-rents, and an account produced, it must be proved to have been a steward's or bailiff's, or it is not to be admitted. 2 *Atk.* 140. February 1740. *Franks v. Carry.*

22. Though a witness be an infant, his tender years will not invalidate his testimony. 2 *Atk.* 245. February 1741. *Smith v. French.*

23. Not only contrary to the statute of frauds, but to the common law before the statute, to add any thing to an agreement in writing by parol evidence. 2 *Atk.* 383. August 1742. *Parteriche v. Powlet.*

24. In the case of satisfaction of legacies, parol declarations have been admitted. 2 *Atk.* 518. February 1742. *Studal v. Jekyll.*

25. Defen-

25. Defendant having examined his clerk in court, the plaintiff exhibited interrogatories for cross-examining him, to which he demurred, for that he knew nothing of the matters inquired of, except what came to his knowledge as the defendant's clerk, or agent. Demurrer over-ruled, for agents are not privileged as counsel, solicitors and attorneys are. 2 Atk. 524. March 1742. *Vailliant v. Dodemead.*

26. Parol evidence not admitted to explain an agreement. 2 Atk. 558. May 1743. *Tyrrel v. Hope.*

27. A merchant's copy-book of letters has been allowed to be read, where a person, who had the original letters, refused to produce them. 2 Atk. 611. July 1743. *Sturt v. Mellish.*

28. Where a plaintiff examines only to a collateral fact one witness, yet the court will so far lay stress upon this evidence, as it may seem to explain any collateral circumstances. 3 Atk. 270. Jan. 1744. *Anon.*

29. Bill for a specific performance of an agreement for a lease, which was signed by defendant, the lessor only, who insisted that it ought to be inserted in the agreement, that the tenant should pay the rent clear of all taxes; the plaintiff, who wrote the agreement, having omitted to make it so. Evidence was admitted to shew, that this was a part of the agreement. 3 Atk. 388. October 1746. *Joyes v. Statbam.*

30. A mortgagee, in an agreement for a mortgage omits to insert a covenant for redemption. Evidence admitted to shew the omission. *Ibid.*

31. A mortgage drawn in two deeds, one an absolute conveyance, the other a defeasance, which mortgagee omits to execute. Evidence admitted to shew the mistake. *Ibid.*

32. A certificate of the original agreement, between the rector and vicar in relation to tithes, must appear to come out of the charter-house of the abbot, and not out of his hands only, or it cannot be read. 3 Atk. 500. May 1747. *Easte v. Ball.*

33. A certificate from a foreign abbey was not allowed before the reformation. *Ibid.*

34. In a matter which depends purely upon tradition, the evidence of an ancient person is admitted. 3 Atk. 578 Mich. 1747. *Attorney General v. Parker.*

35. The bare attesting of a deed as a witness will not create a presumption of knowledge of the contents, so as to affect with fraud, but if there be knowledge of the contents, signing as a witness is a sufficient signing, within the statute of frauds, to bind, though not a party thereto. 1 Ves. 6. May 1747. *Welford v. Barzey.*

36. Payment of interest, for a legacy by an executor from time to time, shall be evidence of assets; not so of a single instance of payment of interest. 1 Ves. 75. March 1747. *Corporation of Clergymen's Sons v. Swainson.*

37. Where the defendant's answer is a clear denial of a fact, which is proved only by one witness, the court will not decree against

against the answer; but otherwise, where the denial of a fact is not positive. 1 *Ves.* 66. December 1747. *L. Neve v. L. Neve*. Vide also 1 *Ves.* 97 and 125.

38. Where the question was, Whether the advancing or paying a sum of money by a father was intended as a bounty to a child, his papers, books, and memoranda were evidence. 1 *Ves.* 77. March 1747. *Hill v. Ballard*.

39. Where any consideration is mentioned in a deed, and it is not said for other considerations, proof of other considerations is inadmissible, but otherwise where there is no consideration mentioned at all in the deed. 1 *Ves.* 128. October 1748. *Peacock v. Monk*.

40. Where deeds or writings are destroyed by a party who would take the benefit of them, equity will go farther than a court of law in odium spoliatoris; but upon a casual destruction of deeds, the evidence is the same in equity as at law. 1 *Ves.* 235. May 1749. *Cookes v. Hellier*.

41. Where *A.* tenant in tail, remainder to *B.* in tail, joined in a mortgage and bond to raise money, and *A.* died, it seems that parol evidence could not be admitted of an agreement, that his creditors should come upon *B.*'s remainder in case of *A.*'s personal estate. 1 *Ves.* 251. June 1749. *Robinson v. Geo.*

42. Parol evidence of intent, that a settlement of 100*l.* should be in satisfaction of a will bequeathing that sum, admitted. 1 *Ves.* 323. November 1749. *Mascul v. Mascul*.

43. The answer of a defendant in another cause, in which he admitted a settlement, was offered to be read; objection that it could only be read as collateral evidence, and not as a judicial confession, and that to let in any kind of collateral evidence, there should be some proof of the deed having been lost; the answer was read, subject to proof being made of the loss of the deed. 1 *Ves.* 388. February 1749. *Whitfield v. Fauisset*.

44. A deed lost may be proved by circumstances, first shewing that it once existed, and next, that it is lost, and cannot be come at. *Ibid.*

45. All contracts depend on the usage of trade, which is proved by the evidence of persons conversant therein. 1 *Ves.* 459. May 1750. *Baker v. Paine*.

46. Whether the evidence of a witness to a will, who was a creditor of the testator's, could be admitted. *Dub.* 1 *Ves.* 503. July 13, 1750. *Price v. Lloyd*, and 2 *Ves.* 374. Stat. 25 G. 2. c. 6.

47. All deeds and other instruments must be proved, unless in the hands of the adverse party, or destroyed, then parol evidence of their contents allowed. 1 *Ves.* 505. July 1750. *Cole v. Gibson*.

48. A man's own entry in a book of account allowed as evidence, on enquiry before the Master, where all papers, &c. are to be produced, not as evidence of the demand, but as a claim in his life-time. 2 *Ves.* 54. November 1750. *Lefebvre v. Woiden*.

49. Parol

49. Parol evidence of a father's intent as to education, on devise of a guardianship, admitted. 2 *Ves.* 56. Nov. 1750. *Anon.*

50. Decree, where the present plaintiffs and defendants were parties, read as evidence, though not conclusive. 2 *Ves.* 89. December 1750. *Askew v. Poulterers' Company.*

51. So, as to depositions in the above cause where the bill and the decree was for the performance of trusts, settling the rights of all. *Ibid.*

52. Wife, having a separate estate, borrows money: her declarations, as the debtor, read. 2 *Ves.* 193. Feb. 1750. *Peacock v. Monk.*

53. Sentence in the ecclesiastical court for fornication, &c., in a criminal way, not evidence against the issue. 2 *Ves.* 245. March 1756. *Brownwood v. Edwards.*

54. Parol evidence on one side may be called for by the other. 2 *Ves.* 331. July 1751. *Blunt v. Cumyns.*

55. Evidence of counsel or attorney submitting to be examined, read. 2 *Ves.* 446. July 1752. *The Bishop of Winchester v. Fournier.*

56. Exhibits  *viva voce* cannot be read where there is a right to cross-examine. 2 *Ves.* 479. July 1752. *Earl Pomfret v. Windsor.*

57. Where a cause stands over to make or add new parties, and, on amendment, publication is open, it seems that all parties may enter into a new examination; and that a new examination to the original bill may be read against another defendant. 2 *Ves.* 524. July 1754. *Archer v. Pope.*

58. Public books, as of a manor, ordered to be produced; but not books in private hands. 2 *Ves.* 578. August 1754. *Anon.* and 624.

59. Depositions in a cross cause read on the account, though the bill was dismissed. 2 *Ves.* 579. August 1754. *Lubiere v. Genon.*

60. Exhibits found forged cannot afterwards be said to be immaterial, nor will the court go into other evidence, the verdict being decisive. 2 *Ves.* 579.

61. The rule, that a witness to be examined *do bene esse* must be seventy years old, dispensed with on affidavit, that he was upwards of sixty, and greatly afflicted with the gravel, and that all the parties lived in Virginia. *Amb.* 65. June 1747. *Fitzhugh v. Lee.*

62. On a rehearing depositions may be read, which were not read at the original hearing. *Amb.* 90. May 1750. *Cunyngham v. Cunyngham.*

63. Where a resulting trust is insisted on, in opposition to the legal operation of a will, parol evidence admitted to rebut that equity. *Amb.* 123. *Lake v. Lake* Nov. 1751.

64. On a bill to have construction of a settlement, articles or instructions cannot be given in evidence, unless the bill points them out, or the settlement refers to them. *Amb.* 147. June 1752. *Pritchard v. Quinckant.* 2 *Ves.* jun. 417. S. P.

65. In matters of trade, evidence of the usage and custom of merchants is admissible. *Amb.* 186. *Aug.* 1753. *Ekins v. Mackilish.* 2 *Ves.* 331.

66. Parol evidence admitted to prove the destruction and contents of deeds. *Amb.* 247. *Dec.* 1754. *Saltern v. Melhuish.*

67. Legacy to poor dissenting ministers in any county, not void for uncertainty, but evidence admitted to prove who were intended. *Amb.* 524. *Nov.* 1765. *Waller v. Child.* *Amb.* 175. 374. 3 *Ves. jun.* 148. S. P.

68. Sentence in the ecclesiastical court *ex directo*, held conclusive evidence upon the same matter coming on collaterally before the court of Chancery. *Amb.* 756. 1775. *Meadows v. Duchess of Kingston.*

69. The evidence of one witness, corroborated by circumstances, though to facts denied by the defendant's answer, sufficient to found a decree. 1 *Bro. Ch. Rep.* 52. *East.* 1779. *Pember v. Mathers.*

70. Bill to redeem an annuity, suggesting that it was part of the agreement that it should be redeemable, but the agreement left out of the deed, on the idea that if inserted the transaction would be usurious, parol evidence rejected, the agreement not being charged to be omitted by fraud. 1 *Bro. Ch. Rep.* 92. *Hil.* 1781. *Lord Irnham v. Child.* 2 *Bro. Ch. Rep.* 219. S. P. and 3 *Bro. Ch. Rep.* 168. S. P., and 1 *Ves. jun.* 241.

71. Parol evidence of an attorney admitted to prove, that a party to a settlement had notice of a prior incumbrance. 1 *Bro. Ch. Rep.* 340.

72. An original letter, stamped after production, is evidence. 2 *Bro. Ch. Rep. Hil.* 1786. *Ford v. Compton.*

73. If the terms of a contract are reduced into writing, the paper must be stamped in order to make it evidence. 2 *Bro. Ch. Rep.* 309. *Feb.* 1788. *Hearne v. James.*

74. Where a *feme covert* disposes by will, it is necessary to produce the probate of such will to justify the payment of the money. 2 *Bro. Ch. Rep.* 391. *Cothay v. Sydenham.*

75. *Query.* Whether the rule has ever been laid down so largely, that a will could not be proved without examining all the witnesses, although the practice has been to examine all? 2 *Bro. Ch. Rep.* 504.

76. Parol evidence of a parent's intention, that a portion should not be a performance of a legacy. 2 *Bro. Ch. Rep.* 164—519. *Debeze v. Maim.*

77. Parol evidence admitted to shew that legacies given by a second codicil were intended as accumulative. 2 *Bro. Ch. Rep.* 521. *Hil.* 1789. *Coote v. Boyd.*

78. A composition cannot be established without shewing the deed by which it was created, or proving its existence. 3 *Bro. Ch. Rep.* 217. *Feb.* 1791. *Heathcote v. Mainwaring.*

79. Though when a wife's estate is mortgaged for the benefit of the husband, she has a right to stand as creditor on the husband's assets, yet this may be repelled by evidence to shew her intention

intention to the contrary. 3 *Bro. Ch. Rep.* 201. *Hil.* 1791. *Clinton v. Hooper.* 1 *Ves. jun.* 173. S. C.

80. An order was made on the registrar of an ecclesiastical court, to deliver an original will to be produced in Chancery, on giving security to return it. 3 *Bro. Ch. Rep.* 263. *June* 1791. *Lake v. Causfield*, and 4 *Bro.* 476. *Dec.* 1793. *Forder v. Wade.*

81. A legatee, having been abroad 26 years, and not having been heard of for 25 years last past, presumed to be dead. 3 *Bro. Ch. Rep.* 510. *East.* 1792. *Dixon v. Dixon.*

82. Parol evidence not admissible to raise an equity, that a pension granted by the crown to the defendant was in trust for the plaintiff, against the oath of the defendant in his answer. 3 *Bro. Ch. Rep.* 577. *Lady Margaret Fordyce v. Willes.*

83. An absolute conveyance decreed to be only a security on parol evidence; it being clear, on the written evidence and the accounts of the parties, that the agreement was not what the deed purported to be. 4 *Bro. Ch. Rep.* 472. *Dec.* 1793. *Cripps v. Gee.*

84. Parol evidence not admissible to prove, from conversations before and at the time of signing an agreement for a lease, that the intent of the parties was different from the memorandum, though the same was written by the lessee, and the words "clear of all taxes," the purport of the conversation, were omitted in the memorandum. 4 *Bro. Ch. Rep.* 514. *Feb.* 1794. 5 *Ves. jun.* 688. S. P. *Jackson v. Cator.*

85. Old age is not a sufficient ground to presume imposition. 1 *Ves. jun.* 19. *Feb.* 1789. *Lewis v. Pead.*

86. A father coming to bastardize his own issue is, though a legal, a very suspicious witness. 1 *Ves. jun.* 134. 1790. *Standers v. Edwards.*

87. Evidence admitted to explain a latent ambiguity in a will, as in case of manors of the same name, and where there is an inadequate description of a child, or a legatee; but not to explain a patent ambiguity. 1 *Ves. jun.* 259. 1790. *Baugh v. Mead.* 3 *Ves. jun.* 148. *Abbot v. Mossie*, S. P.

88. Agreement for a lease of a farm, referring to a paper containing the terms, parol evidence to prove which of the clauses in that paper had been read at a meeting between the parties, refused. 1 *Ves. jun.* 326. *May* 1791. *Brodie v. Paul.*

89. A. stated by books in evidence for the defendant to be a merchant abroad, and one witness swearing he knew him late a merchant abroad, and no evidence of his return, is sufficiently proved out of the jurisdiction, and defendant precluded from objecting that he was not a party. 1 *Ves. jun.* 416. *Feb.* 1792. *Weymouth v. Boyer.*

90. Where an estate is charged with debts and legacies, a creditor by bond is not admissible evidence that the legacies are not paid. 2 *Ves. jun.* 11. *Mich.* 1792. *Jones v. Tuberville*, and 4 *Bro. Ch. Ca.* 11. S. C.



91. An attorney may be called to disclose what passed at the execution of a deed, as a witness, or as to being sent by his client to put a judgment in execution; that is an act: but he is not to disclose private conversation, as to the reasons for executing the deed; and the depositions were referred to the Master to see what part came to the knowledge of the witness, as confidential attorney, that it might be suppressed. 2 *Ves. jun.* 189. *June 1793. Sandford v. Remington.*

92. Evidence to prove the intention of parties to a settlement refused. 2 *Ves. jun.* 417. *Brydges v. Ducheſs of Chandos.*

93. Legacy to an executor for his care: that is equivalent to a declaration of trust; therefore evidence is not admissible as to the residue. 2 *Ves. jun.* 473. *Aug. 1794. Glennell v. Lewthwaite, Thornton v. Tracy. 4 Ves. jun. 22. White v. Evans, S. P.*

94. No parol evidence of an intention afterwards to give an executor the residue will be sufficient; it can only be to shew what was intended at the time he was made executor. *Ibid.*

95. Evidence of conversations with the person who drew the will, to shew the testatrix had no other real estate, rejected. 2 *Ves. jun.* 589. *June 1795. Standers v. Standers.*

96. Parol evidence to explain an agreement refused. 3 *Ves. jun.* 34. *Feb. 1796. Pym v. Blackburn.*

97. Provision by will increased upon evidence of the testator's request to the executor and residuary legatee, and his promise, upon which the testator refused to make a new will. 3 *Ves. jun.* 152. *June 1796. Barrow v. Greenough.*

98. Testator gave a sum, part of his 4l. per cent. Bank Annuities, to his wife for life, and after her decease to several relations. Evidence was admitted, that he had no such stock at the date of the will, having previously sold it all, and invested the produce in Long Annuities, and to shew the cause of the mistake. 3 *Ves. jun.* 306. *Feb. 1797. Selwood v. Mildmay.*

99. Accounts in the testator's hand writing were admitted as evidence of the circumstances, under which he made his will; but not to explain it. 2 *Ves. jun.* 516. *Aug. 1797.*

100. Parol evidence of an intention not to revoke a will, rejected. 3 *Ves. jun.* 650. *March 1798. Cave v. Halford.*

101. The statute of frauds requires, not that a trust shall be created by writing, but that it shall be proved by writing; which may be subsequent to the commencement of it. 3 *Ves. jun.* 696. *March 1798. Foster v. Hale, and 5 Ves. jun. 308. S. C.*

102. When letters are to raise a trust, there must be demonstration that they relate to the subject. *Ibid.* 708.

103. A reference under the stat. 7 G. 2. c. 20. must proceed upon admission of the principal and interest due upon the mortgage; and the Master cannot admit evidence. 4 *Ves. jun.* 105. *July 1798. Hewson v. Hewson.*

104. Surrender by a mortgagee of copyholds to the use of his will, is no proof that he considered it irredeemable. 4 *Ves. jun.* 189. *March 1799. Hardy v. Reeves.*

105. There

105. There were two inconsistent wills; and a codicil referring to the *first* by date, as the last will; the intermediate will is cancelled, and evidence of mistake cannot be admitted. 4 *Ves. jun.* 616. May 1799. *Crosbie v. Macdoul.*

106. Evidence of intention, and mistake as to the fund rejected. 4 *Ves. jun.* 575. June 1799. *Chambers v. Minchin.*

107. Where parol evidence between the executor and next of kin, as to the undisposed of residue, is admitted. 4 *Ves. jun.* 730. July 1799. *Dicks v. Lambert.*

108. Upon a legacy to the wife of the testator, by the description of his *chaste* wife; evidence of her incontinence not admissible. 4 *Ves. jun.* 809.

109. A subsequent marriage and the birth of a child revoke a will. *Query* as to the propriety of admitting evidence against the presumption. 4 *Ves. jun.* 848. July 1799.

110. Parol evidence of an intention to satisfy a legacy cannot be admitted originally, as it may where it is introduced to repel a presumption. 5 *Ves. jun.* 79. Nov. 1799. *Freemantle v. Banks.*

111. Whether a partnership subsisted in the trade of a colliery, is a fact to be tried by evidence, and evidence from books and letters was admitted. 5 *Ves. jun.* 308. March 1800. *Foster v. Hale.*

112. Parol evidence of a declaration in conversation that a legatee should have his legacy discharged of debts due from him to the testator, was produced; but the court seemed to rely on the evidence in writing. 5 *Ves. jun.* 341. March 1800. *Eden v. Smyth.*

113. Whether parol evidence of the intention of the testator can be read originally in opposition to a claim of double legacies, *Quere.* 5 *Ves. jun.* 369. *Osborne v. Duke of Leeds.*

114. The evidence of a subscribing witness to a will, disposing of real estate, dispensed with, he being abroad. 5 *Ves. jun.* 404. May 1800. *Lord Carrington v. Payne.*

115. A partnership cannot be established by the evidence of partners, and their private communications. The fact must be proved *aliunde*. For want of such proof a commission against the ostensible partners was sustained. 5 *Ves. jun.* 424. June 1800. *Ex parte Benfield.*

116. Declarations of a party to a deed previous to the execution, admitted in support of the deed against imputation of fraud. Declarations subsequent impeaching the deed were rejected. 5 *Ves. jun.* 700. Dec. 1800. *Conolly v. Lord Howe.*

117. Evidence that an appointment was improperly obtained, being executed by a will regularly proved, was rejected. 5 *Ves. jun.* 849. March 1801. *Kemp v. Kemp.*

Vide *Depositions—Devise* (G. 2.)—*Evidence—Interrogatories—Contract*, and other proper titles.

## (D) What may be read, by whom.

1. **T**HE court will allow the proving of exhibits *viva voce* at the hearing, but not to let in other examinations, and this only on the application of the party, who is to make use of them, but no instance where it is allowed on the application of the contrary party. 1 Atk. 444. May 1737. *Graves v. Budget*.

2. Where a person has been examined in Chancery, in a cause at law between the same parties, his deposition may be used in evidence. 1 Atk. 445. East. 1737. *Fry v. Wood*.

3. The answer of a defendant, who had been also defendant in another cause, wherein he admitted a deed to have been executed, but as to the uses, he referred to such proof as the plaintiff might be able to make; it was objected, that being an answer in another cause not then at hearing, it could be read only as collateral evidence, not as a judicial confession; and that, to let in any kind of collateral evidence, there should be some proof of the deed; the Chancellor doubted, yet ordered it to be read, yet subject to be conclusive or not. 1 Ves. 388. Feb. 1750. *Whitfield v. Fauisset*.

4. At law a plaintiff cannot examine a defendant as a plaintiff in equity may if there is no material evidence against that defendant, and he is not interested. 2 Ves. 222. March 1750. *Dixon v. Parker*.

5. Depositions of a co-defendant read, where there was no material evidence against him, and no decree. 2 Ves. 224. *Dixon v. Parker*. March 1750.

6. A co-defendant may read evidence proved by the plaintiff. 2 Ves. 623. July 1775. *Walker v. Preswick*.

7. Trustee plaintiff in a bill to have directions of the court may be examined for one of the defendants. Amb. 393. Feb. 1761. *Armiter v. Swanton*.

8. On a re-hearing the appellant may be let into new evidence, which was not read at the original hearing, provided he will give up his deposit. 2 Atk. 408. Oct. 1742. *Hedges v. Cardonnel*.

9. Decree where the present plaintiffs and defendants were parties read, though not conclusive evidence. 2 Ves. 90. Dec. 1753. *Asker v. Poulterers' Company*.

10. Where a cause stands over to add parties, and on amendment publication is open, all the parties may enter into a new examination, and the new examination read against another defendant. 2 Ves. 924. July 1754. *Archer v. Pope*.

(E) What may be read. Deponents interested. 14 Vin. 237.

1. A WITNESS, if interested, must produce a release before he can give evidence: 2 *Atk.* 15. *Mich.* 1737. *Anon.*
2. Where a witness is under the necessity of exculpating her own character first, no regard ought to be paid to her evidence, as to the conduct of others. 2 *Atk.* 97. *Dec.* 1740. *Watkins v. Watkins.*
3. In case of fraud, the evidence of the person who joined in granting away her estate was admitted, though it invalidated her right to it. 2 *Atk.* 228: *Dec.* 1741. *Man v. Ward.*
4. A person made a defendant for form sake, may, in equity, be examined, saving just exceptions; so a trustee may be examined. *Ibid.*
5. The father of *H.*, the plaintiff in the original cause, examined *H.* to the merits: after his father's death he brought a bill of revivor, and became a party interested: this does not disqualify him from being a witness. 2 *Atk.* 615. *July* 1743: *Hand v. Hand.*
6. On a bill brought against an executor to account for assets, the evidence of a co-executor, which tended to increase the testator's estate, was not allowed, as it was swearing for his own benefit. 3 *Atk.* 95. *July* 1744. *Mabank v. Metcalfe.*
7. Depositions of a defendant may be read for the plaintiff, but if a defendant may, by possibility only, be liable to costs, this is a reason for refusing his evidence. 3 *Atk.* 401. *Dec.* 1746. *Barret v. Umfreville.*
8. If a person will so act as to make himself a proper party to a cause, and liable *prima facie* to costs, though he was the only person present at the agreement, he cannot be admitted. *Ibid.*
9. The assignees under a commission of bankruptcy brought a bill to set aside an assignment of an annuity from the bankrupt to *M.*, as being made for no consideration, and as evidence of the fraud offered to read the examination of *M.*'s attorney, taken before the commissioners; the court would not admit it, unless he had been examined in chief in the cause. But as *M.*, by his answer, set up a different right to the annuity from what he had done in his examination before the commissioners, the latter was read to shew the uncertainty. 3 *Atk.* 415. *Hamond v. Myers,* Feb. 1746.
10. A trustee is considered in this court as having no interest at all, and is examined by order every day; but an executor or administrator in trust have been determined not to be capable of being examined; the ground of this distinction is, that an executor is answerable for *devastavit*, &c. which may give an improper bias to his mind, and the possibility of mal-administration

has induced this court to reject him as a witness. 3 *Atk.* 604. *Fotherby v. Pate.* Feb. 1747.

11. The bill charged that the administrator *durante minore etate* had not accounted and delivered over the assets received to the executor, who by answer, instead of insisting that he had accounted, submitted to pay, which made him an incompetent witness. *Ibid.*

12. Witnesses indifferent when examined, though interested afterwards, his depositions read. 2 *Ves.* 42. *Glyn v. Bank of England.* Nov. 1750.

13. Shop books in testator's hand-writing no evidence. *Ibid.*

14. Quære where a witness to a will was a creditor of the testator. 1 *Ves.* 503. *Price v. Lloyd.* July 1750.

15. Deposition of one defendant not read for another, as being concerned in interest, and as a decree might be against him. 2 *Ves.* 219. *Dixon v. Parker.* March 1750.

16. On objection to competency, it is never read; if to credit only, it may be read. 2 *Ves.* 220. *Ibid.*

17. Depositions of a co-defendant read, where there was no material evidence against him, and no decree. 2 *Ves.* 224. *Ibid.*

18. Defendant, by examining witnesses, has adjudged himself interested; yet the depositions may be read, if there be no collusion with the plaintiff. *Ibid.*

19. A man's own entry in a book of account is allowed as evidence on inquiry before the Master, where all papers, &c. are to be produced, not as evidence of the demand, but as a claim in his lifetime. 2 *Ves.* 54. Nov. 1754. *Lefebure v. Worden.*

20. The evidence of a co-defendant *particeps fraudis*, and interested, not allowed. 2 *Ves.* 629. July 1755. *Bridgman v. Green.*

21. Where it is the evidence of an attorney or trustee, the objection goes to his credit only. *Ibid.*

22. A father having imposed upon a trustee in a settlement to give his consent to the execution of a power; on a bill brought to set it aside, the trustees were admitted to prove the imposition, but the father was not, to clear himself. *Amb.* 272. May 1755. *Scroggs v. Scroggs.*

23. Defendant examined as a witness for plaintiff in a matter in which he is not interested; the plaintiff may have a decree against him as to other matters. *Amb.* 583. 1731. *Nightingale v. Dodd.*

24. Deposition of a trustee admitted to be read as to the *quantum* of trust-money in her hands, which was given by a testamentary schedule to her daughter, under circumstances which were held to go to her credit, but not to her competency. *Amb.* 592. July 1753. *Downing v. Townsend.*

25. *Particeps fraudis* cannot be examined to disprove the fraud. *Ibid.*

26. Evidence of a bankrupt having had his allowance and certificate allowed, in regard to the terms on which a lease had been pledged by him. 1 *Bro. Ch. Ca.* 269. *Eagl.* 1783. *Russell v. Russell.*

27. A witness competent who can recover nothing in the suit. 1 *Ves. jun.* 61. *Craven v. Tickell.* 4 *Dec.* 1789.

28. Witness had been examined, and, upon suspicion of his being interested, an issue was directed to discover his interest, and it was thought that the court might have ordered an interrogatory to be exhibited in the nature of a *voir dire*. 3 *Bro. Ch. Ca.* 228. 1791. *Stokes v. MacMerril.*

29. Where an estate is charged with debts and legacies, a creditor by bond is not admissible evidence that the legacies are not paid. 4 *Bro. Ch. Ca.* 115. *Mich.* 1792. *Jones v. Tuberville.* 2 *Ves. jun.* 11. *S. C.*

30. What one defendant said, on application for payment of a legacy, to which she was not liable, not evidence against other defendants, where estates were charged with it. *Ibid.*

31. Witness to a will not interested, at the execution, or death of the testator, is competent, though interested at his examination. 2 *Ves. jun.* 635. *July* 1795. *Biogrove v. Winder.*

(G) What must be pleaded, or may be rejected at <sup>14</sup>*Vin.* 237. the Hearing.

*A.* Stated by books in evidence for the defendant to be a merchant abroad, and one witness swearing he knew him late a merchant abroad, and no evidence of his return, sufficiently proved out of the jurisdiction, as would be presumed at law, and defendant precluded from objecting that he was not a party. 1 *Ves. jun.* 416. *Weymouth v. Boyer.* *Feb.* 1792.

Vide *Plea.*

(B. 2) Charged, in what Cases, and how.

<sup>14</sup>*Vin.* 239.

1. *If A.*, seized in fee of lands, possessed of personal estate, gives all his worldly goods to his wife, and then devises the lands to her for life, then to *R.* his son and his heirs, and gives *M.* his daughter 150*l.*, to be paid her in twelve months after *R.* shall come to enjoy the premises: and if *R.* dies before his mother, then *H.*, another son, coming to the possession thereof, and surviving

living his mother, shall pay *M.* 200*l.*: this charges the real estate only; and shall be paid by the heir claiming under the devisee and heir at law of the testator. 1 *Atk.* 573. *Mich.* 1738. *Miles v. Leigh.*

2. A man cannot by any form of conveyance raise a fee simple to his own right heirs, by the name of heirs, as a purchase, so as to prevent the reversion from being assets to satisfy the son's debts. 2 *Atk.* 57. *Off.* 1740. *Godelphin v. Abingdon.*

3. *George Ward*, having power to charge his estate with 2000*l.*, by his will gives 500*l.* a-piece to his two sisters, and dies indebted to the plaintiffs: this 2000*l.* is the personal estate of *George Ward*, and liable to his debts. 2 *Atk.* 172. *April* 1741. *Bainton v. Ward.*

4. *Thomas Delabay*, on his marriage, settled his estate on himself for life, on his wife for life, remainder to trustees to preserve contingent remainders, remainder to his first and every son in tail male, remainder to himself in fee. A son is born; the father dies indebted by bond; the son afterwards dies without issue; but by his will devises the estate to the defendant in fee: the reversion being come into possession, was assets to pay the father's debts. 2 *Atk.* 204. *Trin.* 1741. *Kinnaston v. Clark.*

5. A devise of an estate charged with the payment of debts to a collateral relation, being a devise to a stranger, the descent is broken, and it is equitable assets. A mere trust estate descending upon an heir at law, is legal assets. *Plunket v. Penfon.* *April* 1742. 2 *Atk.* 293.

6. If a man seised in fee of an estate, having borrowed money, gives bond for it, and afterwards a mortgage on it, and afterwards by will devises the estate in fee so mortgaged, and also an estate for life to *A.* his wife, and makes her sole executrix, and after making his will, purchases, at two different times, the reversion in fee of the lifehold estate, and dies without altering his will: the lifehold estate, and the reversion of it, so purchased, shall descend to the heir at law; but it shall be liable as real assets to exonerate the mortgaged estate in fee devised to *A.* the wife. 2 *Atk.* 424. *Mich.* 1742. *Galton v. Hancock.* 427-434. *S. C.*

### (I) Bound. In what Cases.

1. IF *A.*, and *B.* his wife, seised in right of *B.* of lands in *D.*, held by lease for three lives, and seised of the inheritance in fee, expectant upon the death of *B.*'s grandmother and mother of a manor and lands in *L.*, mortgage the lands in *D.* for 1000*l.*, and then the manor, &c. in *L.* for 800*l.*, and then, on borrowing 200*l.* more, subject both to the payment of the three sums; and before payment *A.* dies and *B.* becomes solely seised, and borrows 240*l.* 6*d.*, which, with 1159*l.* 19*s.* 6*d.* interest, makes up 2400*l.*; and by indorsement on the second mortgage makes both subject thereto; and then agrees with *C.* that for 2260*l.* 10*s.* she shall convey to

to him and his heirs the estate in *L.*, subject to the two lives, the money to be applied in discharge of the mortgage, and that the lease should be renewed, and a third life (*C.*'s son) added, and then *C.* to lend her 1600*l.* to pay the residue of the mortgage, the fine, and her debts, and *C.* pays 100*l.*, and the grandmother dying, *C.* agrees to pay 146*l.* more, and pays several other sums in part, and the lease is renewed and the fine paid, and *C.* takes notes and a bond for the sums advanced till the agreement shall be completed, and before that *B.* dies intestate: On a bill by her administrator, for himself and the creditors of *C.*, admitting the facts, the agreement shall be carried into execution against the heir at law. 3 *Atk.* 1. *Mich.* 1743. *Lacon v. Mertins.*

2. *A.* conceiving himself entitled to a copyhold, was admitted, and sold it; it afterwards descended to him; he died without perfecting the conveyance. This is a personal equity, and does not bind his heir. *Semb.* 1 *Anst.* 11. *East.* 32 *G.* 3. *Morse v. Faulkener.*

3. Trust-term in a will to raise out of a real estate several sums, of which some were secured by the testator's bond and covenant, the intention being to give them as portions out of the land, not as debts or legacies, the personal estate not applicable. 3 *Ves. jun.* 475. 1797. *Reed v. Litchfield.*

*Vide* (B. 2).

## (K. 2) Pleadings in Actions against him.

24 *Vin.* 261.

**D**EBT against an heir; the defendant pleaded *riens per descent*, except a messuage or dwelling-house with the appurtenances, and also a certain windmill with the appurtenances; which said premises were subject and liable to the payment and satisfaction of a certain sum of money, laid out and expended by the defendant, since the death of the ancestor, for, in, and about the repairs of the windmill, with the appurtenances, over and beyond the amount of the rents, issues, and profits thereof: This plea was ruled ill on general demurrer. *Sbetelworth v. Neville.* *Mich.* 27 *Geo.* 3. *B. R.* 1 *Durnf. & East's Rep.* 454.

## (Q.3) Where the Heir shall be compelled to join in a Sale.

24 *Vin.* 274.

**T**HE court will not declare a will well proved, where the heir at law is not before the court, though he cannot be found; but it will decree a sale, 2 *Atk.* 120. *Hil.* 1740. *French v. Barrow.*

*Vide* title *Devise* (S. C.), and the cases there cited.



34 Vin. 276.

## (R) Favored. In general.

1. *A.* Seised in fee, devises his lands and tenements in *B.* to trustees, to apply part of the rents to charitable uses. The testator dies; the church of *B.* becomes void; the heir at law shall present. *Meusey v. Langham. Mich. 1735. Ca. Temp. Talb. 143.*
2. The freehold descending on the heir, an executor cannot enter to take away fixtures without being a trespasser. *Ex parte Quincey, 1 Atk. 477. Aug. 1750.*
3. Testator devised all his lands to *T. C.* and *J. P.*, and their heirs in trust, that they should sell his lands in —, and out of the purchase-money pay his debts; and as to the rest, in trust, to receive the rents and to make leases for 99 years, determinable, &c. and therewith to pay his debts and legacies, and then to the use of *J. A.*, wife of *C. A.*, for life; remainder to the issue male and female of her body; and makes the trustees executors: he likewise gives a legacy of 500*l.* to his nephew *Thomas Prowse*, to be paid at 21 or marriage, who died before 21. The personal estate, of the value of 700*l.*, and the lands in —, were not sufficient to pay the debts. Bill by the administrator of *Thomas Prowse* to have the 500*l.* raised, which the court refused. *Prowse v. Abingdon, 1 Atk. 482. East. 1738.*
4. Every heir at law has a right to inquire by what means and by what deed he has been disinherited. *Harrison v. Southcote, 1 Atk. 539. July 1741.*
5. An heir, before he has established his title at law, may come here to remove terms out of the way, which would prevent his recovering there, and may also have production and inspection of deeds and writings. *Ibid.*
6. 10,000*l.* charged by Lord *Bingley* on a term of 1000 years shall not be paid off out of his personal estate; but the land on which it is charged shall bear the burthen. *Burgoigne v. Fox, 1 Atk. 575. May 1738.*
7. An heir at law does not want an express intention to take by a will, though it is otherwise with regard to a deed. *Lloyd v. Spillet, 2 Atk. 151. March 1740.*
8. If a man seised in fee of *A.* directs that it shall be exchanged for *B.*, and devises it to trustees for that purpose, and to permit his wife to enjoy *A.* till the exchange, and then to settle *B.* on his wife for life, with remainders to the same persons to whom he had limited other manors by his will, whereby he has devised all his real estates to trustees, and the exchange cannot be made; the heir at law of the testator, and of the surviving trustee for *A.*, shall not have *A.*; but the person entitled under the will to the other manors shall have it. *2 Atk 366. Trin. 1742. Earl of Coventry v. Coventry.*

9. In exchanges it is not clear on an alienation by one party, and an eviction, whether the heir or the alienee should enter. *Ibid.* 2 *Atk.* 369. July 1742.

10. If a person incapable of managing his affairs, and who is afterwards found a lunatic, at that time lays out part of his personal estate in the purchase of land, with the approbation of his only son, the purchase shall stand; for the court will give the turn of the scale in favour of the heir at law. 2 *Atk.* 412. *Mich.* 1742. *Sergefon v. Sealey.*

11. If money be settled to be laid out in land, and afterwards all the parties interested agree, that if *A.* dies before it is so invested, then it shall go to them, and their executors and administrators, according to their respective interests, and one of the parties dies before *A.*, it shall go to the heir, and not to the executor. 2 *Atk.* 452. *Mich.* 1742. *Oldham v. Hughes.*

12. On a bill to establish a will against an heir at law, though he makes default, the proofs must be read; for the will cannot otherwise be proved. 3 *Atk.* 25. Feb. 1743. *Webb v. Litcot.*

13. But where there is a trust of money clearly intended to be considered as money, though afterwards there is a power given to the trustees to lay it out in land, yet if it is not done, it shall not be considered as land, nor go to the heir. 3 *Atk.* 212. *Hil.* 1744. *Stamper v. Miller.*

14. If a man, by articles before marriage, covenant to settle lands, or a rent-charge thereout, of 40*l.* *per ann.*, on trustees to the use of himself for life, then to the wife for life in bar of dower, remainder to the heirs of their bodies, and he has then no real estate, but purchases afterwards one of 9*l.* in *A.* and another of 40*l.* in *B.*, subject to an estate for life to another in an undivided moiety, the lands in *A.* and the moiety in possession of those in *B.* shall be considered as purchased in performance of the covenant, and go towards the widow's jointure, the moiety not in possession shall go to the heir at law. 3 *Atk.* 323. 1746. *Deacon v. Smith.*

15. If *A.*, by articles before marriage with *B.*, covenants to lay out 2000*l.* in land, and to settle on *A.* for life, *B.* for life, then to trustees to sell and divide the money among the children of the marriage, to sons at 21, daughters at 21 or marriage, provided no sale be made till one of the shares become payable; and lands are purchased, part before and part after *A.*'s death. *C.*, the only child, attains 21 in *B.*'s lifetime, but never applies for a sale, nor are the lands conveyed to her, but she lets leases of them, reserving rent to her and her heirs; *B.* dies; *C.* dies intestate; the lands shall go to the heir at law. 3 *Atk.* 680. *Hil.* 1747. *Crabtree v. Bramble.*

16. If a man devises a legacy out of his land to his heir at law, and the land to another; and the will is not well executed according to the statute of frauds for the real estate; the court will not compel the heir at law, upon accepting the legacy, to give up the land. 3 *Atk.* 695. 1740. *Herle v. Greenbank.* 1 *Ves.* 298. S. C.

17. If

17. If a man gives legacies to his executors, and a copyhold to A.: he paying his executors 1000*l.* and gives the residue of his estate to a charity; this 1000*l.* is a charge on real estate, therefore void by the statute of *Mortmain*, and the devisee cannot take without performing the condition; therefore the 1000*l.* shall go to the heir. 1 *Ves.* 108. *Trin.* 1748. *Arnold v. Chapman.*

18. Where a man, by will, directs his real estate to be sold, and the produce, together with his personal, to pay debts and legacies, and one of the legacies is void by law, or lapses, it goes to the residuary legatee, and not to the heir at law. 1 *Ves.* 320. *Mich.* 1745. *Durour v. Motteux.*

19. Where an heir at law, by his answer to a bill brought to establish a will, admits it to be duly executed, and to the purport as set forth in the bill, his saying at the close of his answer that he is heir at law to the testator is not enough to entitle him to an inspection of the deeds, even if he had pointed out what the deeds were he wanted to inspect, and the substance of them, which was not the case. *Potter v. Potter*, 3 *Ath.* 719. 1 *Ves.* 274. S. C. *July* 1749.

20. A copyhold tenement intailed being burnt, a collection in briefs to rebuild was paid to the guardian of the tenant in tail, who dies under age, without its being so applied; the claimants under the intail are entitled to the money, and not the personal representative. *Rook v. Warth*, 1 *Ves.* 460. *May* 1750.

21. Books are not heir looms, but the property of the first taker tenant in tail. 2 *Ves.* 121. *January* 1750. *Duke of Bridgewater v. Egerton.*

22. Heir general, or by custom, not disinherited by implication. *Byas v. Byas*, 2 *Ves.* 165. 1750.

23. An heir must recover at law against devisee. *Knight v. Duplessis*. 2 *Ves.* 362. *July* 1751.

24. Bill by a disinherited heir dismissed without costs. *Leman v. Alie*. *Jan.* 1753. *Amb.* 163.

25. Money left by will to be laid out in land, the trustee being entitled to the money, lays part of it out in a purchase, but afterwards discharges that estate of the trust; and, making his will, gives generally, without taking notice of this money, his real and personal estate to A., who afterwards makes his will, and gives his real estate to B., and his personal estate to C. The trust-money passes as personal estate. *Pulteney v. Earl of Darlington*, 1 *Bro. Ch. Rep.* 223. 1783.

26. Testator gives legacies, to be raised by the means after pointed out; then directs an estate to be purchased, a sum to be raised for maintenance, and the residue of the rents to be applied to raise the legacies: and in default makes the estate liable. The legacies are not personal, but a charge on the real estate; and one of the legatees dying an infant, the legacy shall not be raised for the administrator. 3 *Bro. Ch. Ca.* 108. *July* 1790. *Harrison v. Naylor.*

27. The Chancellor in this cause thought that he had authority to order timber decaying on a lunatic's estate to be cut; but did not absolutely decide the point, or whether the produce should be considered as real, or personal estate, and go to the heir, or next of kin. *Ex parte Bromfield*, 3 Bro. Ch. Rep. 510. 1 Ves. jun. 453. S. C. East. 1792.

28. Testator contracts for a particular estate, but dies before the purchase is completed; afterwards, from the state of his affairs, the contract is dissolved: yet the purchase-money shall not sink into his personal estate, but be laid out in other lands to the same uses as he had devised the land contracted for, *Whitaker v. Whitaker*, 4 Bro. Ch. Rep. 31. July 1792.

29. When an heir at law is brought by order before the court, though there be no resulting trust in his favour, he shall have his costs. *Attorney General v. Haberdashers' Company*, 4 Bro. Ch. Rep. 178. Hil. 1793.

30. Timber felled on a lunatic's estate, by the committee, by order of the court, the produce is the personal estate of the lunatic. Bill by the heir at law dismissed. *Oxendon v. Lord Compton*, 4 Bro. Ch. Rep. 397. 2 Ves. jun. 69. S. C. July 1793.

31. A., entitled to a sum of money secured by a trust term, and also to another sum of money under a covenant in her father's settlement to convey to the use of his eldest son in fee, subject to such second sum as an additional provision for younger children; dies before either of the sums was raised, leaving her brother, a lunatic, her sole next of kin, and entitled to the estates liable to the two sums; he dies, and held that his heir takes the estates discharged. 2 Ves. jun. 261. July 1793. *Lord Compton v. Oxendon*.

32. Testatrix, having given real and personal estate to pay legacies, and the personal being sufficient to pay them, the real estate shall not be sold for the next of kin. *Chitty v. Parker*, 4 Bro. Ch. Rep. 411. 2 Ves. jun. 271. S. C. July 1793.

33. As between real and personal representatives, their rights are purely legal; and neither has any equity to convert the property. *Walker v. Denne*, 2 Ves. jun. 176. May 1793.

34. An heir is excluded only by testator's giving to somebody else: for the heir will take what is not disposed of, even against the testator's intention, 2 Ves. jun. 225. 1793. *Habergbam v. Vincent*.

35. Personal estate under marriage articles was to be invested in land, or government or other securities; the court, finding it in its original state, considers it as personal; but part of it having been laid out in land, which was settled and afterwards sold, and the produce invested in stock till a proper purchase of land could be found to be settled to the same uses, that was considered as land. *Brislow v. Warde*, 2 Ves. jun. 336. June 1794.

36. Land devised to be sold; the produce to be applied as after mentioned: if no disposition is made, the heir shall take, *Sheldon v. Barnes*, 2 Ves. jun. 447. Aug. 1794.

37. Testator

37. Testator gave real estates to be sold, and the produce to be considered as part of his personal estate; and thereout and out of his personal estate gave legacies to the next of kin, heir and others: he gave other estates to be sold, and the produce to be considered from thenceforth as other part of his said personal estate, and to be disposed of in manner following: he then gave legacies and some estates specifically, and other legacies out of his said trust-monies and personal estate; and gave his executor 1000*l.* to be disposed of according to any *instructions he might leave in writing*, and gave all the residue of his goods and chattels, personal estate and effects whatsoever, subject to debts, legacies, &c. No instructions being found, the heir held entitled to the 1000*l.* *Collins v. Wakeman*, 2 *Ves. jun.* 683. *July 1795.*

38. By settlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of the grantor's term, in trust to raise an annuity for the lives of the wife and her mother and the survivor; then reciting that the remainder of the term might expire in the life of the wife or her children, therefore, to make a provision for her and her children by the then or any future husband, the trustees should be possessed of the said tolls for the remainder of the said term, upon trust to raise, after the deaths of the grantor and the mother of the wife, 100*l.* annually, to be placed out in the purchase of freehold lands or hereditaments, or leasehold estates for two or three lives, as often as a competent sum should be raised for that purpose; and, until convenient purchases should offer, to be invested upon government securities upon trust; in case the wife should survive the term, to pay the rents and profits of such estate or estates so to be purchased, or the interest, produce, and profits to arise from the money so intended to be placed out, until such purchase should be made, to the wife for life: and, after her decease, to apply the said rents and profits, or interest-money, towards the support and maintenance of such child and children of her as should be living at her death, till the youngest should be 21; and then to be possessed of such estates so to be purchased, or of the money arising from the annuity not placed out in one or more purchase or purchases, to the use of such child and children, in such shares and proportions, payable at 21, as the survivor of the husband and wife should, by will or deed, direct, limit, or appoint: and in default thereof, to the use of all such children, equally to be divided at their respective ages of 21; but if she should die without leaving any child or children, or all should die under 21, then to the use of the grantor, his heirs, executors, administrators, and assigns, and after paying the said annuities to be possessed of all the surplus money arising from the said tolls during the remainder of the term for the use of the grantor, his executors, &c. From the death of the grantor, who survived the wife's mother, the trustees received 100*l.* a-year, and laid out in stock the sums received, and the produce. One son was the only issue; he attained 21 in the life of his mother, and survived

survived her. The court would not invest the fund in land; but held it, with the accumulations from the death of the grantor, and the future payments, as a vested interest in the son at 21, and as personal estate belonging to his administrator. 3 *Ves. jun.* 41. 1796. *Swann v. Fonnereau*.

39. Estate sold, subject to a mortgage, was exonerated in favour of the heir by the personal estate of the purchaser, his acts having clearly made it his personal debt. *Wood v. Huntingford*, 3 *Ves. jun.* 128. May 1796.

40. Mortgaged estate descends; the mortgagee pressing, the security is assigned: a mere covenant by the heir upon that occasion for payment, does not make it his personal debt; neither does a mere covenant by the purchaser of a mortgaged estate to indemnify the vendor make it his personal debt. *Ibid.* 131.

41. Real estate devised to be sold, and the produce disposed of with the personal, with a power to direct the fund to be laid out in land: no such direction having been given, it was held personal property. *Maberly v. Strobe*, 3 *Ves. jun.* 450. July 1797.

42. Under the constitution of the *Hand-in-Hand* fire-office, the heir, to whom, upon the death of the insured, the property being freehold descended, cannot have the benefit of the policy without assignment. *Mildmay v. Folgham*, 3 *Ves. jun.* 471. July 1797.

43. Neither an heir at law nor next of kin can be barred by any thing but a disposition. *Pickering v. Lord Stamford*, 3 *Ves. jun.* 493. Aug. 1797.

44. Where there was a power to sell, but the legal estate was not devised, it descended to the heir, till the execution of the power. 3 *Ves. jun.* 513. Aug. 1797. *Warneford v. Thompson*.

45. Money bequeathed to *A.* to remain at interest, or to be by him laid out in real estates to go with other estates devised. *A.* being tenant in tail of the real estates, and being entitled under an assignment of the money from the reversioner, subject to contingent limitations, disposed of the money by will. The court inclined in favour of the disposition, upon the ground that *A.* might have called for the money as absolute owner: but it was established upon the option to continue it personal estate. *Amler v. Amler*, 3 *Ves. jun.* 583. Jan. 1798.

46. Devise of a copyhold (duly surrendered) to *A.* and his heirs in trust for *B.* and his heirs. Upon the death of *B.* without heirs, the heir of the trustee has no equity to compel the lord to admit him, and his bill was dismissed, but without costs. *Williams v. Lord Lonsdale*, 3 *Ves. jun.* 752. May 1798.

47. The court will not interfere between representatives by changing the nature of property in execution of a trust, the object of which has failed. *Croft v. Sle*, 4 *Ves. jun.* 60. July 1798.

48. An heir at law has no equity, except to remove incumbrances in the way of his legal title: he cannot call for an inspection of deeds in the possession of the devisees. *Lady Shaftesbury v. Arrow-*

*4. Arrowsmith, 4 Ves. jun. 66. July 1798.—Vide Iny v. Mels-  
wich, 2 Ves. jun. 679.*

49. If an estate is devised charged with legacies, which fail, the devisee, and not the heir, shall have the benefit of it. *Reu-  
nell v. Abbot, 4 Ves. jun. 811.*

50. No equity between the heir or devisee and the personal re-  
presentative to convert property from the state in which it was  
found at the death. *Attorney-General v. Bowyer, 5 Ves. jun. 303.  
1800.*

51. To convert real or personal property, as between the real  
or personal representatives, from the state in which it is found at  
the death, the characters of land or money must, by the trust,  
covenant, &c. be imperatively and definitively affixed to it :  
otherwise, if there be an option, there is no equity. The bill by  
the heir, claiming the property as real estate, was dismissed with-  
out costs. *Wheldall v. Partridge, 5 Ves. jun. 388. May 1800.*

52. Whether the Journals of the House of Lords, delivered to  
a peer, go with the title? *Upton v. Lord Ferrers, 5 Ves. jun. 801 :  
March 1801.*

24 Vin 279.

(S) *Interim Estate.* In what Cases the Heir shall  
take it.

1. **W**HERE money is given to be laid out in lands, and when  
bought to be settled on such and such persons; on a bill,  
the course is to direct a purchase, and the profits of the money  
in the mean time to go as land. *Earl of Coventry v. Coventry,  
2 Atk. 349. July 1742.*

2. Directions in a will to purchase an estate, which is after-  
wards swallowed up by an inundation; the money shall not go to  
the executor, but as the rents of the purchased lands would have  
gone. *Ibid.*

3. If there be an executory devise of lands, with a proviso in  
the will, that the profits, beyond an allowance, shall be laid up  
for the first person who shall be entitled to the lands, when he at-  
tains 21, and the testator dies, leaving no person *in esse* to take  
under the limitations; until such person be born, the profits are  
to be looked upon as an undisposed of residue, and descend to  
the heir at law. An if such person comes *in esse*, and dies, the  
heir at law is still entitled to the profits, beyond the maintenance,  
during the infant's life, and to all profits afterwards, till a person  
comes *in esse* entitled to an estate for life in possession. *1 Ves. 268.  
Trin. 1749. Hopkins v. Hopkins.—Vide Ca. Temp. Talb. 44.*

4. Devise in trust for the child of testator's daughter; if she  
die without issue, over; the intermediate profits, till the contin-  
gency happens, accumulate, and descend to the heir. *Gibson v.  
Lord Montfort, 1 Ves. 490. June 1750.*

*Vide tit. Devise (R. c), (P. a), pl. 2., (N. b), and (O. b),  
sect. 2. passim.*

(S. 2) *Marriage Portion.* Where it shall go to the Heir. [ F ]  
14 Vin 281.

1. **W**HETHER a portion charged on land be given with or without interest, by deed or by will, if the person dies before the age at which it becomes payable, it shall sink into the estate. 1 Atk. 552. Mich. 1738. *Boycott v. Cotton.*

2. A proviso in a settlement that 1000*l.* shall and may be laid out by the trustees in the purchase of lands. Where there is a power to lay out money in land, but the original intention was, that it should be considered as money, if not vested in land, it shall not be considered as such, and go to the heir. *Stamper v. Miller*, 3 Atk. 212. Feb. 1744.

3. R. B., by articles previous to his marriage, covenanted to lay out 2000*l.* in the purchase of lands, and to settle the same on himself for life, and after his decease, on Mary his intended wife for life, and after both their deceases, to trustees to sell, and the money arising by such sale to be divided among the children of the marriage, to sons at 21, daughters at 21 or marriage, *provided no sale be made till one of the shares become payable.* The purchase was made accordingly, afterwards Elizabeth, the only surviving child, died unmarried, but had attained the age of 21; the absolute proprietor of these estates, Elizabeth, having taken them as land in her lifetime, and done acts to shew that she intended them to be considered as real estates, they must be held as such, and go to the heir. *Crabtree v. Bramble*, 3 Atk. 680. March 1747.

4. Money, by marriage articles to be laid out in land to the use of husband and wife for life, then to the children as they should appoint; in default of appointment, equally; if but one, to that one in tail; reversion to the husband in fee. There was one daughter; the trustee pays the money to her and her husband; she not being *sui juris*, nor separately examined; the payment is not sufficient to make it to be considered as money, and the sister of the half blood may claim the reversion in fee of the father. *Cunningham v. Moody*, 1 Ves 174. Dec. 1748.

Vide *Portions* (I).

(T) Where he shall have the Surplus.

14 Vin. 281.

1. **A**N executor in trust for an infant of a lease for ninety-nine years, determinable on three lives, on the lord's refusing to renew but for lives absolutely, complies, and changes the years into lives; on the infant's death under age and intestate, this shall be a trust for his administrator, and not for his heir. *Witter v. Witter*, 3 P. Wms. 100. Hil. 1730.

2. Devise



2. Devise of a rent-charge, to be sold to pay legacies amounting to 800*l.*, and if the rent-charge should sell for 1000*l.* the testator gives a further legacy of 200*l.*; it sells for more than 800*l.* and less than 1000*l.*: the excess beyond the 800*l.* belongs to the heir as a resulting trust. *Stonehouse v. Evelyn*, 3 *P. Wms.* 252. *East.* 1734.

3. Testator, amongst other legacies, gives a legacy of 5*l.* to B. his brother and heir, makes his wife C. his sole heiress and executrix of all his lands, tenements, goods, and chattels, to sell and dispose of the same as she should think fit, to pay his debts and legacies. This is a gift to her of the surplus in fee, and there is no resulting trust for the heir. *Rogers v. Rogers*, 3 *P. Wms.* 193. *Ca. Temp. Talb.* 268. S. C.

4. R. S., incumbent of the rectory of B., devises his perpetual advowson, donation, and patronage of the parish church of B., and all glebe lands, profits, and appurtenances to the same belonging, to G. S., *willing and desiring* her to sell and dispose of the same to Eaton college, and on refusal, to Trinity college, Oxford, and on refusal, to any college in Oxford, or Cambridge, who will be the best purchaser. There is no resulting trust of the advowson of B. to the heirs at law of the testator, but a devise of the beneficial interest therein to G. S., with an injunction only to sell to particular societies. The general rule, that, where lands are devised for a particular purpose, what remains after such purpose is satisfied, results, admits of several exceptions; there can be no constructive trust, but where the intent of the testator is apparent *willing and desiring*, G. S. to sell, &c. are more properly words of injunction than trust; but where a real estate is devised to *be sold* for payment of debts, there is clearly a resulting trust. *Hill v. the Bishop of London*, 1 *Atk.* 618. *Feb.* 1738.

5. Testator devises the perpetual advowson of S. to trustees, upon trust to present his son W. to this living, and that after the church shall next after his death be full of an incumbent, then to sell the perpetuity, and to apply the profit arising from the sale, first for payment of debts, and the overplus he distributes in thirds to his daughters: the trustees presented W. the son, who died before the advowson was sold, leaving a daughter an infant, who, by her next friend, brings her bill, insisting that, after debts and legacies paid, there is a resulting trust to the heir at law of the testator in the advowson; but the court was of a different opinion. *Hawkins v. Chappel*, 1 *Atk.* 621. *Nov.* 1739.

6. There is no resulting trust under the statute of frauds and perjuries, but what is called so by operation of law; where an estate is purchased in the name of one person, and the money is paid by another, he has a resulting trust; or where it is declared only as to part, and nothing said as to the rest, what remains undisposed of results to the heir at law. *Lloyd v. Spillett*, 2 *Atk.* 150. *March* 1740.

7. A bare

7. A bare intention, or even negative words, will not exclude an heir at law from insisting on a resulting trust. *Cook v. Duckenfield*, 2 *Atk.* 565. *May* 1743.

8. Where a legacy was to be paid out of the real estate, and the legatee died before the contingency happened on which he was to take, the legacy was held to sink into the estate for the benefit of the heir at law. *Attorney-General v. Milner*, 3 *Atk.* 112. *July* 1744.

9. If a child, who has a legacy payable out of land, dies before the contingency happens, it goes to the heir; *a fortiori* if it be given to a stranger. *Ibid.*

10. Legacy to the executors of the will, and land devised to C. to pay 1000*l.* to the executors, the residue to a charity; this 1000*l.* is a charge on the real estate, which, by the *mortmain* act, is not well disposed of, and results to the heir at law. *Arnold v. Chapman*, 1 *Ves.* 108. *July* 1748.

11. If a man by will gives all his worldly estate, and all his real and personal estate, to trustees, to pay several annuities and other sums out of personal, and if that be deficient, out of rents and profits of real; and as to the residue of real and personal, to such children as his daughter shall have, equally; if she dies without issue, to others; and directs, that on the death of annuitants their annuities shall go back to the residue, and go to those in remainder over, in case his daughter dies without issue, otherwise to be divided amongst them equally; the surplus rents and profits of the real estate accumulate, and do not go to the heir at law; but whether to the daughter's children or to those in remainder over, *quære*. 1 *Ves.* 485. *Trin.* 1750. *Gibson v. Lord Montford*.

12. The resulting trust of a copyhold estate, as well as of a freehold, is within the statute of frauds. *Withers v. Withers*, *Amb.* 151. *Nov.* 1752.

13. One devises his estate to be sold, and gives the residue of the money to arise by the sale to a charity, and made a residuary legatee, the charity legacy being void, shall go to the testator's heir. *Gravenor v. Hallum*, *Amb.* 643. *March* 1767.

14. E. C. conveyed several sums of money, secured by mortgages, amounting to 60,000*l.*, to trustees in trust to be laid out in the purchase of lands, to the use of himself for life, remainder as to sums, to the amount of 28,000*l.* to his wife for life, remainder to his son R. C. for life, with several remainders over, remainder to J. L. in fee; and as to sums, amounting to 23,000*l.* to R. C. for life, with several intermediate remainders; remainder to T. L. in fee: and as to one particular mortgage, of 8500*l.*, and some leasehold estates to secure annuities; the surplus to R. C. in fee, with power of revocation. By his will he gave these leasehold estates, and the mortgage for 8500*l.*, together with another mortgage of 6700*l.*, in trust to secure the annuities; the surplus interest, or rents of the lands purchased, to be paid to R. C. for life, and to be settled in the same manner as his other

estates: 1st, the mortgages to be considered as real estates; 2dly, it being *uncertain* which of the limitations they were to follow, they are undisposed of, and passed to R. C. as heir at law, and from him to his general devisee E. C., who, having died intestate as to real estate, they go to her heir at law. *Leslie v. Duke of Devonshire*, 2 Bro. Ch. Rep. 187. Trin. 1787.

15. Real and personal estate being given to trustees to be sold, and converted into personalty, the trustees to pay the produce to A. for life, without further disposition, the residue does not go to the trustees, as undisposed of, though they were made executors, and one of them had a legacy, but is a resulting trust for the heir, for so much as was the produce of the real estate; and as to the personal, for the next of kin. *Robinson v. Taylor*, 2 Bro. Ch. Rep. 589. 1 Ves. jun. 44. S. C. East. 1789.

16. The residue of a mixed fund, given by a citizen of London in mortmain, results to the heir at law, and next of kin in proportions. *Middleton v. Cater*, 4 Bro. Ch. Rep. 409. July 1793.

17. Real and personal estate devised to the executor in trust to pay debts and legacies; the rest and residue to himself; the only purpose for devising the real appearing to be to insure payment of debts, without any intention to disinherit the heir, it was held only a charge, and that the heir was entitled to the surplus of the real estate. *Halliday v. Hudson*, 3 Ves. jun. 210. July 1796.

18. Devise on a future contingency, and no intermediate disposition of the rents and profits; a resulting trust for the heir at law. *Attorney-General v. Bowyer*, 3 Ves. jun. 725. March 1798.

*Vide* Suppl. tit. *Devise* (O. 6), (R. c), *ante*, *Resulting Trust* (E).

24 Vin. 226.

### (W) Heirs *ex parte materna* take, in what Cases.

1. *F. W.*, having an estate which came to her *ex parte materna*, on her marriage, conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs; by will, she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life: then (after the deduction of 3500*l.* to uses which vested in the plaintiff *A. J.*, and after payment of 1000*l.* to *G. P.*) to pay the residue of the purchase-money to the three defendants *H.* By codicil she gave the plaintiff, her husband, a power of appointing the 3500*l.* in case *A. J.* should marry without his consent. *G. P.* died, living the testatrix, before the codicil made, but *F. W.*, in the codicil, took no notice thereof, 1st, the 1000*l.* is real, not personal, and shall not go to the executors of *G. P.* (though given to her executors), nor to the personal representatives of the testatrix, nor yet to the residuary legatee of the purchase-money, but to the heir at law, *ex parte materna*, (the side from which the estate came). 2d, the 3500*l.* is vested in *A. J.*, and the trustees having laid out a larger sum by  
17/.

17. with intent to appropriate, it is well appropriated; and *Ann Jones* having married once with her father's consent, his power is gone; and he consenting to give up his life-interest, it was directed to be paid to the trustees in her marriage settlement. 3 *Bro. Cb. Rep.* 128. *Hil. July 1790. Hutchinson v. Hammond.*

2. Where the equitable and legal estates, equal and co-extensive, unite in the same person, the former merges: therefore where the former descends, *ex parte paterna*, the latter *ex parte materna*, upon their union the paternal heir has no equity. 3 *Ves. jun.* 339. *Murch 1797. Selby v. Alston.*

3. Though a real estate be devised to be sold, yet if a testator has done nothing to exempt the personal estate, it shall be primarily liable: the rule is the personal estate shall be first applied, unless there be express words, or a plain intention of the testator to exempt it, or to give it as a specific legacy. *Walker v. Jackson, July 1743.* 2 *Atk.* 624. *Foley v. Percival, 4 Bro. Cb. Ca.* 419.

4. Where the personal estate has been exhausted in payment of specialty creditors, the widow shall stand in their place, as to the amount of her paraphernalia upon the real assets of the heir at law. 3 *Atk.* 369. *June 1746. Snelson v. Corbet.*

5. An advowson in fee in gross is assets by descent to satisfy bond creditors. An estate *pur autre vie*, though it is devised, will be liable to debts by specialty, to contribute in a course of administration. *Westfailing v. Westfailing, March 1746.* 3 *Atk.* 460.

6. Assets descended on the heir at law must be applied to the payment of debts before the lands can be charged which are specifically devised. *Powis v. Corbet, Aug. 1747.* 3 *Atk.* 556.

7. The executor of a bond creditor of Sir *W. F.*'s brings a bill for an account of his personal estate, and if it falls short of satisfying his debts, prays that a sufficient part of the real estate may be sold. The real estate never having been assets of Sir *W. F.*, the lands comprised in the settlement made after his marriage are not liable to his debts by specialty; for they are not specific liens on the land. 3 *Atk.* 631. *March 1747. Brown v. Danton.*

8. The testator desires all his debts may be discharged by his executors, adding, "I mean those only of my own contracting; not those heavier debts by my family;" and gives his personal estate to his mother, whom he makes executrix, desiring her to pay all his just debts exactly; long after making the will, the mother buys in mortgages charged on his estate by his ancestors, and the son covenants to pay the money. The personal estate is still exempted from the principal and interest due on these mortgages, which are still a charge on the real. 1 *Ves.* 51. *Nov. 1747. Lemon v. Newnham.*

9. The real assets of *A.*, who took out administration to the executrix of *B.*, and administered *de bonis non* to *B.*, who entered into the usual bonds to the ordinary, followed by *B.*'s legatees. *Ashley v. Baillie, July 1751.* 2 *Ves.* 368.

10. The personal estate shall not exonerate the real of a debt not contracted by the party. 2 *Bro. Ch. Ca.* 57. *Eaff.* 1786. *Earl of Tankerville v. Faucet.*

11. Where the testator directed his trustees to possess themselves of his *estates and substance*, and to pay his debts, it was held that this was a charge on the real estate, and that the assets should be marshalled for the benefit of legatees. 3 *Bro. Ch. Ca.* 347. *Aug.* 1791. *Foster v. Cook.*

12. *A.*, being master of both funds, charges a debt, which was personal, on the real estate; his heir shall not have the real estate exonerated out of the personal. 4 *Bro. Ch. Ca.* 199. *Hil.* 1793. *Hamilton v. Worley.* 2 *Vesf. jun.* 62. S. C.

13. Legacy charged upon real estate, and payable at a future day, sinks as to the real estate by the death of the legatee before the time of payment, and the assets cannot be marshalled. 5 *Vesf. jun.* 135. *June* 1796. *Pearce v. Leman.*

14. *A.* purchased an estate, subject to a mortgage; the personal estate shall not exonerate the real of the mortgage debt, though the purchaser has given a fresh security. 2 *Bro. Ch. Ca.* 101—152. *Tveddal v. Tveddal.* 1786. *Vide also* 4 *Bro. Ch. Ca.* 2—419. and the cases there cited.

15. To exempt the personal estate from the payment of debts, the will must afford a necessary implication, *viz.* that implication which leaves no doubt upon the mind of the judge. *Hartley v. Hurl,* 5 *Vesf. jun.* 540. *July* 1800.

*Vide* letters I and K, titles *Assets* (Z. d), *Devise*, *Covenant* (D), (G. 2), *Executors* (G. a), (G. a. 5), and other proper titles.

[ B ]  
14 *Vin.* 251.

(F. 5) By Custom. Who.

*See Denn v. Spray*, stated in *Suppl. tit. Descent* (A), *ante.*

14 *Vin.* 257.

(G. 4) By Limitation. Who *Heirs Female.*

1. THE case of *Brown v. Barkham* (stated in 8 *Vin.* 317. *pl.* 12.) was, in 1741, brought by bill of review before Lord *Hardwicke*, who indeed affirmed Lord *Cowper's* decree, but was far from following his lordship in his reasons. According to Mr. *Hargrave*, in note 3—*Co. Lit.* 24. b., where that gentleman investigates and defends the doctrine of Lord *Coke*, that a person, in order to take by purchase under the description of *heir special*, must answer both parts of that description, by being actually *heir*, as well as that *species of heir* denoted by the description (which doctrine is by Lord *Coke* there laid down, in contradistinction to the special heirship which the law admits of by *descent*); according to this note, Lord *Hardwicke*, in giving judgment, divided the case into

into two questions; 1st, Whether it was an established rule, that he, who claims as *heir male by purchase*, must be *generally* heir, as well as nearest male descendant; 2dly, Whether the apparent intention of the testator might not create an exception to the general rule. Mr. Hargrave then proceeds to state Lord Hardwicke's words on the 1st question, in which his lordship admitted, that the distinction between an heir male of the body to take by *descent*, who is nearest male descendant of the party claiming through males, and to take by *purchase* who must be *heir*, as well as a male descendant of the body, had been long ago established; but, as he thought the case before him might be determined, without determining that question, he should leave the rule unimpeached, he said, and found his decree upon the second question. He then proceeded, adds the annotator, to consider the second question; and, after stating several authorities to shew that there might be exceptions to the general rule, he pointed out the particular circumstances which might be relied upon in the case before him; and, on account of them only, affirmed Lord Cowper's decree. *Amb. 8. S. C.*

2. In a subsequent case however, where *A. P.*, and his son *J. P.*, upon the marriage of the latter with *B.*, settled certain lands to the use of *A. P.* and his heirs until the marriage; and afterwards, as to part of the lands, to the use of *J. P.* for life, and after intermediate remainders (to the use of his wife for life, and of his sons by her or any other woman successively in tail male), to the use of the heirs male of the body of the said *A. P.*, remainder to the use of the heirs male of the body of *J. P.*, remainder to the use of *J. P.*, his heirs and assigns; and as to the residue of the lands, to the use of *A.* for life, and after several intermediate limitations (to the use of *J. P.* for life, and to his wife in part for life, and of the sons of the marriage successively in tail male), to the use of *J. P.* and the heirs male of his body, remainder to the use of *A. P.* his heirs and assigns. *A. P.* died without issue male in the lifetime of his father, leaving *B.* his widow, and one daughter, by her, named *Ann*. *A. P.* afterwards, by his will, noticing that, by the death of his eldest son *J. P.* without issue male, part of his estate then in his possession was, by the said marriage settlement, vested in him in fee simple, devised the said estate to his son *W. P.* for life, with remainder to his sons successively in tail male, and for want of such issue, to the heirs male of his (testator's) body begotten, and for want of such issue, to his own right heirs for ever. *A. P.* died, leaving his said granddaughter *Ann* his heir at law, and his son *W. P.* who (as well as *J. P.* his deceased brother) was the testator's issue by a first wife; and also leaving *H. P.* an eldest son, and several other children, by his second wife. Afterwards *W. P.* who, at his father's death, was *heir male of his body*, died leaving a son, who died leaving a son *H. J. P.* who died an infant without issue; and no recovery was suffered by *W. P.* or his son. Upon the death of *H. J. P.*, *H. P.*, the then eldest son and heir male of the body of *A. P.* by

Upon this case, it may be observed, that, by the opinion in the former part of the certificate, that *H. P.* would have taken by purchase if a third person had been the grantor, the doctrine of Lord Cowper in *Brown v. Barkham*, that a person may take as special heir by purchase, without at the same time filling the character of heir general, is affirmed, as well in the case of a *deed*, as by the opinion in the latter part of the certificate it is affirmed in the case of a *will*.

his second wife, entered upon that part of the estate which was, by *A. P.*'s will, devised to the heirs male of his body. And afterwards, upon the death of *Ann*, the widow of *J. P.*, *H. P.* took possession, *as heir male of the body of A. P.*, of the lands which she had held for her life under the settlement. Upon a bill filed by *Ann*, the daughter of *J. P.*, and heir general of *A.*, and her husband, claiming in her right, *as heir at law and heir of the body of J. P.*, to be entitled, on failure of issue male of the whole blood, to that part of the estate which was limited by the settlement to *J. P.* in fee; and also claiming, in her right, *as heir at law of A. P.*, to be entitled to the estates of which the reversion in fee was limited to him by the settlement, as not devised by his will; a case was made for the opinion of *B. R.* upon the questions, Whether any and what estate passed by the settlement to the defendant *H. P.*, as heir male of the body of *A. P.* the grantor? And whether any and what estate passed to the said defendant *H. P.*, as heir male of the body of the said *A. P.* by his will? Upon which the judges certified, they were of opinion, that the defendant *H. P.*, by the settlement took *by descent, as heir male of the body of A. P.* the grantor. That, in case a third person had been the grantor, they should have thought that *H. P.* would have taken an estate in tail male *by purchase*, under the description of *heir male of A. P.* And that they were of opinion, that an estate in tail male passed to the defendant *H. P.* *as heir male of the body of A. P.* by his will. *Wells v. Palmer, 5 Burr. 2615. 2 Black. 687. S. C.*

3. And in a case where *N. N.*, upon his marriage with *M. C.*, settled lands to the use of himself for 99 years, if he should so long live, and from and after his decease, to the use of trustees and their heirs, during his life to preserve contingent remainders; and from his decease, to the use of *M. C.* for life, remainder to the use of the sons of the marriage successively in tail, remainder (after a limitation for preserving the estate to posthumous sons in tail) to the use of *the heirs female of the body of N. N. to be begotten on the body of M. her or their heirs; and for want of such issue*, to the use of the right heirs of *M.* There was issue of the marriage three sons and six daughters. The two younger sons, and all the daughters except one, named *Ann*, and their issue, died in the lifetime of *N. N.* The eldest son died also in his lifetime, leaving issue a son, who afterwards died in *N. N.*'s lifetime without issue, and a daughter, who afterwards married *J. F.* At length *N. N.* died. On these facts a case arose, and was brought on, first in *B. R.*, and afterwards in the exchequer, and argued three times in each court. The general question was, whether *Ann*, the surviving daughter of *N. N.*, or *A. F.*, his grand-daughter and heir-general, were entitled to recover the premises. On this question a variety of points, irrelevant to the subject of the present section, were started; and some of them were so disposed of as to bring into discussion the following point, namely, Whether *Ann*, the daughter, took, under the settlement, any estate *by purchase, as heir-female* of

of the body of *N. N.* by *M.* his wife? And judgment was given in both courts in favour of *Ann*, the daughter. *Evans ex dem. Burtenshaw, MS. Rep.* See accordingly *Harg. note 2. Co. Litt. 164. a.*

See *Gwynn v. Hook*, 1 *Wils. 30. a.* and *Suppl. tit. Devise (U. 6);* and (*W. 6*) *ante.*

(*W. 2*) Heir *ex parte materna*. What shall be said a [B] *new Purchase*; or such an Alteration of Estate as 14 Vin. 238. to carry the Land, &c. to the Heirs of the Father; [*et vice versa*].

1. TENANT in fee, *ex parte materna* of an equitable estate, took a reconveyance of the legal estate from the trustee; and it was held, that the estate descended on the paternal heirs, as in other cases of purchase. *Doe v. Putt*, cited in *Doug. 773.*

2. *A.*, having contracted for the purchase of lands, but never taken any conveyance, devised his real estate to his wife, in trust to educate his son till he should attain 21, and then to convey the same to his son in fee. The lands, after *A.*'s death, were conveyed by the vendor to *A.*'s widow, who died before the son attained 21, leaving the son her heir. The son afterwards attained that age, and died, having devised the land to charitable uses, which disposition was void by the statute of mortmain. On a question between the heir at law of the son, *ex parte paterna* (on which side the equitable estate devolved on him), and his heir at law, *ex parte materna* (on which side the legal estate descended on him), it was held, that the equitable estate merged in the legal, and both followed the line through which the legal estate descended, and that therefore the maternal heir was entitled. *Goodright v. Wells*, 2 *Doug. 770.*

3. *J. T.* being seised in fee, upon the marriage of *M.* his eldest daughter with *F. L.*, by indenture covenanted to levy a fine, and suffer a recovery to the use of himself for life, remainder to *F. L.* for life, remainder to his daughter *M.* for life, remainder to the first and other sons of *M.* by the said *F. L.* in tail male, remainder to the first and other sons of the said *M.* by any other husband in tail male; with the ultimate remainder to his own right heirs in fee. A fine was levied, and a recovery suffered, to the uses of this indenture. On the death of *F. L.*, without issue male, the said *M.* married Sir *J. B.*, and had issue by him a son named *Jacob*, who, on the death of his father and mother, became seised of an estate tail in the premises by purchase, under the settlement, with the reversion in fee by descent *ex parte materna* (this reversion having descended from *J. T.* the settlor upon *M.* the mother of *Jacob*). *Jacob*, in the year 1725, suffered a common recovery in the usual form, having, by a deed of bargain and sale enrolled, made



made a tenant to the *precipe*, and declared by the same deed, that such recovery should enure to the use of himself and his heirs; and died without issue. Upon the death of *Jacob*, *J. S.* entered into the lands, as heir *ex parte paterna*, against whom *J. T.* brought ejectment, claiming as heir to *Jacob*, *ex parte materna*. The question was, Whether, as was contended on behalf of the plaintiff, the recovery operated only as a bar of the estate tail, and thereupon let the reversion in fee which descended *ex parte materna* into possession; or Whether, as was insisted on the other side, it either enlarged and continued the estate tail to a fee which it passed to the recoveror (as said in *Pigg.* 21.), or destroyed it, and gave *Jacob* a new estate in fee by purchase? *Willes* Ch. J. delivered the opinion of the court of *B. R.* in the following words: "Our opinion is, that *Jacob*, by the common recovery, conveyed a fee to the recoveror; and, as there cannot be two fees, the reversion in fee comes too late, so that it was not the reversion that he conveyed; and we are of opinion, that the uses arise out of the estate-tail which *Jacob* had by purchase originally *per formam doni*, and not out of the reversion; and that, after his death, the lands in question descended to the heirs general, and not to the heirs *ex parte materna*, because he took the estate tail by purchase." Judgment for the defendant. And upon an appeal to the house of lords, this judgment was, with the unanimous concurrence of the judges, confirmed. *Martin ex dem. Tregonwell v. Strachan*, 1 *Str.* 1179. 1 *Wils.* 66. a. 4 *Bro. Par. Ca.* 486. 5 *Durnf. & East*, 107., note S. C. See *Abbot v. Barton*, stated in *pl.* 6. of the sect. to which this is a supplement.

4. A feme covert, being seised of an estate tail by purchase, with the reversion *ex parte materna*, and of another by descent *ex parte materna*, of which part was copyhold, joined with her husband in suffering a recovery of the freehold estates in *C. B.*, and of the copyholds in the court of the manor. It was resolved, that the operation of a recovery suffered of a copyhold estate was, as to this point, precisely similar to that of a recovery suffered of a freehold estate; as it would lead to perplexity, if different rules were applied to different sorts of estates. That the court was bound to adopt the doctrine laid down in the case of *Martin v. Strachan*; and therefore, that part of the estate in which the person who suffered the recovery took an estate tail by purchase, must go to the heir *ex parte paterna*; and that, in which she took an estate tail by descent from the maternal ancestor, to the heirs *ex parte materna*. *Roe v. Baldwin*, 5 *Durnf. & East*, 104.

## House.

[ G ]

(B) In what Cases it may be broken to enter. By 14 Vin. 315.  
Officers, &c.

1. A Bailiff, in execution of *mesne* process, may break open the door of a lodger's apartment, having first gained peaceable entrance at the outer door of the house, *Lee v. Gansell*, 1 Cowp. 1.

2. Commissioners of bankrupt may break open the house of the bankrupt to search for his goods, but not any other house, though for the same purpose. 2 Show. 247.

3. An officer cannot justify the breaking open an outward door or window, in order to execute process in a civil suit. If he doth, he is a trespasser. But if he find the outward door open, and enter that way, or if the door is opened to him from within, and he enter, he may break open inward doors, if he find that necessary in order to execute his process. *Foster C. L.* 319.

4. If a man, being legally arrested, escapeth from the officer, and taketh shelter, though in *his own house*, the officer may, upon fresh suit, break open doors in order to retake him, having first given due notice of his business, and demanded admission, and been refused. *Foster*, 320.

5. And not only in the above, but in every case where doors may be broken open, there must be such notification, demand, and refusal, before the parties concerned proceed to that extremity. *Ibid.*

6. Where the outer door was a hatch-door, the upper part of which was open, but the lower bolted at top and bottom, the officer unbolted the top; and not being able to reach the bottom leapt over it, and unbolted it, and let in the others; it was ruled by *Wilmot J.* that this entry was lawful. *Maxwell v. King*, Reading Lent Ass. 1766. Cited *Esp. N. P.* 604.

7. But where, in an action for breaking and entering plaintiff's house, it appeared that the plaintiff's house stood in a stable yard which was surrounded by a wall, there was a hatch-gate which stood at the foot of the stairs which led to an open gallery, from whence there were doors to several apartments; at the top of the stairs there was a door across that part of the gallery which led to the chamber where the plaintiff was: the defendants, having got into the yard, broke open the door at the top of the stairs, and arrested the plaintiff. *Kenyon C. J.* held, that it was the outer door of the plaintiff's dwelling, and that the arrest was illegal. *Hopkins v. Nightingale*, 1 Esp. Rep. 99.

8. If

8. If *A.* be in possession of part of a house, and *B.* of the other part, and an officer enter into *A.*'s part, under a writ against *B.*'s goods, *which are not there*, *A.* may maintain an action against the officer for breaking and entering his *house*, for it was his *domus mansionalis*, and the goods of *B.* not being *there*, but in another part of the house, affords no justification to the officer on entering that part. *Fallon v. Anderson, Peake's N. P.* 110.

24 Vin. 318. (C) Stealing out of Houses, Shops, Out-houses, &c.  
How punishable. And what be said such stealing.

1. IT has been held, that an accessary before the fact, that is, a person that is not in the shop, warehouse, coach-house, or stable, at the time the goods are stolen, but who waits at a distance to receive the goods, is not within the statute 10 & 11 Will. 3. c. 23.; and yet the words are, that whoever shall "assist, hire, or command another to commit this offence, shall be deprived of clergy." *Jonathan Wild's Case, O. B.* 1 *Leach's C. C. (notes)* 21.

2. It is certain, however, that if two or more persons be together in the shop, warehouse, coach-house, or stable, at the time the goods are privately stolen, aiding and assisting each other to commit the felony, they are all equally guilty. *Case of Ann Sheldon and Mary Williams, O. B. June Sess. 1785.*

3. It is settled that the stealing of money privately from a shop, warehouse, coach-house, or stable, is not within the statute, for the words are "goods, wares, and merchandizes;" and it has been repeatedly decided that these words do not include money, either in specie or in bank notes. *Mill's Case, Leach. Ca. Cr. Law*, 43. 1 *P. Wms.* 267. 2 *Ibid.* 212.

4. It has also been decided, that if it appear on evidence that the offender broke open the shop, warehouse, coach-house, or stable, he shall not be ousted of his clergy; for where any degree of force is used to obtain the goods, it excludes the idea of privately stealing. *Cartwright's Case, O. B.* 1726. *Foster's C. L.* 79.

5. It has been ruled, that if a watchmaker receive the watch of a customer to repair, and hang it in his show glass until it is fetched away by the owner, his shop it not, as to watches so situated, a shop within the meaning of the statute, but a mere repository where the watch was kept for the owner, and not exposed to sale by the watchmaker. *Stone's Case, Ca. Cr. Law*, 375.

6. The 12 Ann, c. 7. making it a capital offence to steal to the amount of 40s. does not extend to a person's stealing to that amount in his own house. *E. Thompson's Case, Ca. Cr. Law*, 379.

7. And therefore if a wife steal the property of a person in the house of her husband, it is not a stealing in the house of another within

within 12 *Ann*, c. 7. *Gould's Case*, *Ibid.* 257. *Macdaniel's Case*, *ib.* 379.

8. A house under repair, but not inhabited, is not the dwelling-house of the owner. *Lyon's Case*, *Ibid.* 221.

9. It has been held, that the property must be taken in a shop, warehouse, coach-house, or stable; for where a chariot stood under a gateway which was used as a shed, in the yard belonging to a coach-house, and the glass of the chariot thus standing were privately stolen, it was held not within the statute. *John Archer's Case*, *May Sess.* 1781. *O. B.*

10. A ready-furnished house is not within the stat. 3 & 4. *Will. & Mary*, c. 9. for such a house is not to be considered as lodgings. *Palmer's Case*, *Cr. Cases*, 782.

11. A house, into which the owner has only removed his goods, but has not slept in it himself, or otherwise taken personal possession of it, is not his dwelling-house as to the crime of burglary. *Thompson's Case*, *Cr. Cases*, 893.

(D) What passes by Name of a House.

14 *Vin.* 318.

1. BY a devise of a house *cum pertinentiis*, only the garden and orchard will pass with it; but by the devise of an house with the land appertaining thereto, the land usually occupied therewith will pass. One devised that his cousin *A.* should continue to live at his house, and be at the charge of keeping the house, and the servants, and coach-horses, which the testator employed in plowing the ground, and spend the corn arising therefrom in the house; here the land enjoyed with the house shall pass to the cousin of *A.* *Blackborn v. Edgely*, 1 *P. Wms.* 603.

2. *A.* being tenant for years of a house, gardens, stables, and coal-pen, bequeathed in the following words, "I give the house I live in and garden to *B.*" The stables and coal-pen, occupied by *A.*, together with the house, passed without being expressly named, though the testator used them for purposes of trade as well as for the convenience of his house. *Doe v. Collins*, 2 *T. R.* 498.

3. What shall be said to pass by a devise of a messuage or dwelling-house only, or of a dwelling-house with the appurtenances, is purely a question of intention to be collected, as in other cases of intention, out of the whole will. Thus a devise of "messuages, with all houses, barns, stables, stalls, &c. that stand upon or belong to the said messuages," under special circumstances, clearly manifesting the intention of the testator to devise the lands belonging to the messuages, was held to pass those lands. *Gulliver v. Poyntz*, 3 *Will.* 141. 2 *Bl. Rep.* 726. *S. C.*

4. But unless it clearly appear, that the testator meant to extend the word "appurtenances" beyond its technical sense, lands usually occupied with the house will not pass under a devise of a messuage with the appurtenances. *Buck v. Burton*, 1 *Bos. & Pull.* 53.

14 Vin. 319.

## (E) What is Parcel of it.

1. **I**N trover for ten load of timber, the case was, that the defendant had been tenant to the plaintiff, and erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground; and upon proof that it was usual in that country to erect barns so, in order to carry them away at the end of the term, a verdict was given for the defendant. *Culling v Tuffnel, at Hereford, 1694. Buller's N. P. 34.*

2. Of late many things are allowed to be removed by tenants which would not have been permitted formerly, as marble chimnies, &c.; so more strongly in things relative to trade, as brewing vessels, coppers, fire engines, cyder mills, &c. The general rule of law is, that whatever is fixed to the freehold becomes part of it, and cannot be moved; but many exceptions have been admitted of late to this general rule; as between landlord and tenant, or between tenant for life, or tail, and the reversioner; but the rule holds still as between heir and executor. *Bull. N. P. 34.* See also *2 Stra. 1241. 1 Atk. 477. 3 Atk. 13. 16. and Toller's Law of Executors.*

[D]

## Hunting.

14 Vin. 328.

## (A) Justification of Trespas.

**A** PERSON may justify trespas in FOLLOWING a fox with hounds over the grounds of another; if he aver that it was the only means of killing the fox, and also if he does no more damage than is absolutely necessary. *Gundry v. Feltham, 1 Term Rep. 334.* See also *3 Term Rep. 259. n. a.*

See Suppl. tit. *Game, &c.*

14 Vin. 329.

## Hypothecation.

See *post*, Suppl. tit. *Master of a Ship.*

## Identitate Domini.

[ G ]

### (D) Proceedings and Pleadings.

24 Vin. 333.

THREE prisoners, under sentence of death, having broke out of gaol, were afterwards taken, and brought to the bar of the court of King's Bench upon the returns of writs of *habeas corpus*: the Attorney-General prayed that they might be asked, "What they had to say why the court should not proceed to award execution against them upon these attainders for the said felonies." Accordingly they were respectively asked that question: and, being arraigned, they severally denied the identity; and the Attorney-General averred it. And, on counsel being assigned the prisoners, he asked time to take instructions from his client: but the court denied it, saying, that such issues were to be tried *instantly*; though the court might, upon circumstances, give time. Whereupon a jury was immediately impanelled and sworn. *Rex v. Rogers et al. Mich. 6 G. 3. B. R. 3 Burr. 1809.*

### (A) Jew.

[ D ]

24 Vin. 333.

1. UPON error in debt upon bond, the bail, being both Jews, were suffered to put on their hats while they took the oaths. *Gomez Serra v. Munez, 2 Str. 821.*

2. Marriages, where both parties are Jews, are excepted out of the marriage act, 26 Geo. 2. c. 33.

[ G ]

## Impar lance.

24 Vin. 335. (A) Impar lance. And what shall be said to be such, and in what Cases, and at what Time, it may be.

1. **I**N dower, or any other real action, impar lance is not to be given; effoigns are sufficient delay; real actions are not within any of the rules of court concerning impar lances. *Foster v. Kirkley, Trin. 26 & 27 Geo. 2. C. B. Barnes's Notes, 2.*

2. Declaration delivered against a prisoner on the last day but one of *Easter* term. A question arose, Whether the defendant was entitled to an impar lance till *Craf. Trin.* Upon looking into the old rule, touching the delivery of declarations to prisoners, the court were of opinion, that the defendant was not entitled to an impar lance, but must plead two days before the effoign-day of *Trinity* term, according to that rule. *Bond et al. v. Jope, Trin. 6 & 7 Geo. 2. C. B. Ibid. 224.*

3. In an action for defamatory words, importing that the plaintiff was guilty of the murder of *A. B.* defendant moved for an impar lance till the following term, on affidavit that a prosecution was then carrying on against the plaintiff for the said murder, and that he would probably be tried before that term; an impar lance was accordingly granted: and the court said, "that impar lances are in the discretion of the court, and it may be of ill consequence to enter into evidence concerning this murder in the action for words before the trial for the fact." *Sibson v. Nivin, Hil. 10 Geo. 2. ibid. id. Co. Rep. C. B. 139. S. C.*

4. There can be no impar lance after a peremptory rule to plead has been given. *Fitzwilliams v. The Bishop of Hereford and the University of Cambridge, Trin. 13 & 14 Geo. 2. ibid. 225.*

5. Impar lance granted on affidavits that defendant was a lunatic. *Higham's case, 1 Trin. 17 & 18 Geo. 2. ibid. id.*

*vide following placitum.*

6. If a writ be returnable the first or second return of any term, and the defendant puts in bail in time, and the plaintiff declares; but the declaration is delivered without notice to plead, according to the general rule, *Pasch. 3 Geo. 2.* the defendant is entitled to an impar lance. *Baker v. Barlow and Wife, Mich. 18 Geo. 2. ibid. id.*

7. A writ returnable the first return of *Hilary* term in a bailable action; declaration left in the office without notice to plead indorsed thereon; but notice of declaration and to plead was afterwards served on the defendant. The defendant moved for an impar lance

## Impar lance.

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impar lance for want of notice indorsed, which was denied; the notice served on defendant being sufficient within the rule 3 G. 2. *Vide* Swin-ley v. Woodhouse, Mich. 21 Geo. 2. *Cam v. Gardner*, Hil. 19 G. 2. *Barnes's Notes*, 226. same book, and page—2 *contra*. But see the case of *Gascoigne et Ux. v. Brown*, Trin. 24 Geo. 2. *ibid.* p. 227. where it was determined that it is not necessary (though usual) to indorse the notice on the declaration.

8. When the plaintiff amends his declaration, and pays costs, the defendant is not entitled to an impar lance, but must plead after the rule to plead is out. *Know v. Wyche. et al.* East. 1 G. 2. *Prac. Reg. C. B.* 17.

9. An action was removed by *habeas corpus* in B. R. the 6th day of November; upon the 12th November the plaintiff delivered a declaration, and gave a rule to plead. The defendant moved for an impar lance, but not allowed; the court saying, that they would not put the plaintiff in a worse condition than he was in the court below. *Wood v. Wenman*. Mich. 20 G. 2. B. R. 1 *Wilf.* 154. *Vide* Smith v. James, 6 Durnf. & East's Rep. 752. S. P.

10. If a writ be returnable the last day of one term, and the defendant does not justify bail until the fourth day of the next term, he is not entitled to an impar lance to the third term, though the plaintiff do not deliver a declaration *de bene esse* before the effoign day of the second term. *Rolleston v. Scott*. Mich. 34 G. 3. B. R. 5 *Durnf. & East's Rep.* 372.

### (C) What may be pleaded after Impar lance.

14 Vin. 337.

DEFENDANT cannot plead in abatement after a general impar lance, without obtaining a special impar lance precedent to the time of pleading, which must be within the four days given by the rule to plead. *Threlkeld v. Goodfellow*, *Barnes's Notes*, 224. *Prac. Reg.* 1. S. C.

## Implication.

[B]

14 Vin. 341.

See Suppl. tit. *Copyhold* (S. e), *Devise* (N. a), (P. a), *ante*, and other proper titles.



[ F ]

## Incumbrances.

14 Vin. 353. (C) *Bought in by subsequent Mortgagees or Incumbrancers.* How far protected.

1. **N**ONE but a *bonâ fide* purchaser of a *puisne* incumbrance without notice of intermediate ones can tack it to a prior. 2 *Atk.* 52. *October 1740. Moirett v. Paske.*

2. A prior mortgagee, who has an assignment of a third mortgage as a trustee only, cannot tack the two mortgages together to the prejudice of intervening incumbrancers. A mortgage may be tacked to a judgment, because the judgment creditor, by virtue of an *elegit*, may bring an *ejectment*, and hold upon the extended value, and as he has a legal interest in the estate, the court will not take it from him; but this rule holds only where the same person has both judgment and mortgage in the same right, and not where he has the judgment in his own right, and the mortgage in another right, as a trustee only. Where there is a prior mortgagee, who has a *puisne* incumbrance, a second mortgagee shall not redeem the prior without redeeming the *puisne* also. And where a mortgagee has a bond as well as a mortgage from the mortgagor, the heir must discharge the one as well as the other; but where a prior incumbrancer has a bond likewise, it shall be postponed to all other incumbrancers, whether by mortgage, judgment, or statute staple, for he has not the same equity against a *puisne* incumbrancer, as against an heir at law, who is liable in respect of assets. And a prior creditor, who buys in *puisne* incumbrance, though he did not give the value, shall be allowed the whole; otherwise as to a *trustee*, *agent*, *heir at law*, or *executor*. *Per Lord Hardwicke, Chancellor. Ibid.*

3. A prior mortgagee may tack a judgment to his mortgage, though subsequent in time to a second mortgage, provided he has no notice of the second. 2 *Atk.* 352. *July 1742. Shephard v. Fitley, 2 Vef. 662. Anon.*

4. A third mortgagee cannot take in a prior security, to displace a second mortgagee after a decree to account, and before the master has made his report. 3 *Atk.* 811. *August 1754. Wortley v. Birkhead, 2 Vef. 571. S. C.*

5. Deed of appointment of lands in *Middlesex* postponed to a mortgage subsequent to, but registered before it. 2 *Vef.* 413. *July 1752. Scrafton v. Quincey.*

6. Second mortgagee with notice of a former, but without notice of a trust charge antecedent to both, of which the first mortgagee had

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had notice, must take subject to that demand. 2 *Ves.* 485. July 1752. *Earl of Pomfret v. Lord Windsor.*

7. The third mortgagee, buying in the first mortgage *pendente lite*, shall exclude the second. 1 *Bro. Ch. Rep.* 63. *Trin.* 1779. *Robinson v. Davison.*

8. Mortgagee may protect himself against a claim of dower, by taking an assignment of an old mortgage term prior to the right of dower. 5 *Ves. jun.* 130. December 1799. *Wynn v. Williams,*

*Vide tit. Mortgage.*

(F) Bought in. Redeemable by Purchasers or Creditors, on what Terms. 14 *Vin.* 358.

*Vide tit. Mortgage.*

## In Custodia.

[G]

(C) Of delivering Declarations to Persons *in Custodia.* 14 *Vin.* 360.

1. **W**HERE the defendant is in custody, the declaration must be delivered to the turnkey, and not into the office. *The declaration must be delivered to the prisoner or left with the turnkey, though he has appeared by attorney.* *Clavey v. Watts,* 2 *Blac. Rep.* 786. *Greenbouse v. Clever, Mich.* 8 *Geo.* 1. *B. R. Stra. Rep.* 474.

2. Where a defendant is in custody, it is necessary not only to deliver the declaration to the turnkey of the prison, but also to enter it in the prothonotary's office, before a rule to plead is given. *Sir William Strickland v. Hodgson, Hil.* 8 *Geo.* 2. *C. B. Barnes's Notes,* 372.

3. In a declaration against a prisoner in custody of the sheriff, it must be alleged at whose suit he is detained, pursuant to stat. 4 & 5 *W. & M. c.* 21. *Williams v. Wills, Hil.* 19 *Geo.* 2. *B. R. 1 Wils.* 119.

## Indictment.

[C]

(A) Indictment. Extortion. And Misdemeanors. 14 *Vin.* 362.

**A**N under-sheriff refused to execute a *capias ad satisfaciendum* till his fees were paid. And, upon motion against him, the court said that the plaintiff may bring an action against him  
Vol. V. G for

## Indictment.

for not doing his duty, or might pay him his fees and then indict him for extortion. *Nescott's case*, 1 Salk. 330. Vide 2 Term Rep. 155.

2. Indictment against defendants for extortion, by compelling an executor to prove a will in the Bishop's Court, and taking fees thereon, knowing the same to have been proved in the Prerogative Court. *Rex v. Loggen et Froome*.

3. Where custom has ascertained the toll of a mill, a miller may be indicted for extortion; but in the case of a *new mill*, where the miller is not restrained to any certain toll, the persons resorting to it must comply with the miller's demands; and whatsoever he takes, it is not extortion, because it is the voluntary agreement of the parties. *Rex v. Burdett*, 1 Ld. Raym. 149.

N. B. The following note to be inserted in the margin to pl. 14. of *Old Viner*, p. 364. as over-ruling the case of *King v. Crisp*.

But it seems now to be settled, that an indictment will not lie for a *bare trespass*, (as tearing an account). *Rex v. Johnson*, 1 Will. 325. *Sayer*, 27. For the words *vi et armis* alone are not sufficient. *Rex v. Storr*, 3 Burr. 1698. *Rex v. Atkyns*, 3 Burr. 1706. There must be such an actual force as implies a *breach of the peace* to make a *trespass* an indictable offence. *Rex v. Baker*, 3 Burr. 1731. And this degree of actual force must appear on the face of the indictment. Doug. 153.

4. An indictment for extortion *colore officii*, without shewing for what it was extorted, held good. 4 Hawk. P. C. 26. f. 55.  
14 Vin. 364.

## (B) Contempts to Courts.

1. **A**RRRESTING a party while attending an arbitrator under a rule of court, is a contempt of court. 2 Bl. Rep. 1110.

2. The defendant, having treated the process of the court contemptuously, an attachment went against him, without a rule to shew cause. *Rex v. Jones*, 1 Str. 185.

3. It has been adjudged that the trying a *feigned issue*, without the consent of the court, is a contempt for which the parties may be punished by attachment, and the proceedings stayed. *Hofkins v. Lord Berkley*, 4 T. R. 402.

4. The defendant filed a bill in Chancery to set aside an award, after entering into a rule of court of King's Bench to abide by it; the court in this case, as the defendant had smarted severely (by payment of the costs incurred) were unwilling to punish him further by *fine and imprisonment*, and yet, as his contempt was so obstinate, they did not care that a slight sentence should stand upon the record; therefore they waived giving judgment, by *consent*. They said, the attorney and counsel were equally guilty of the contempt, and more criminal, and if it ever happened again they would proceed against them. *Rex v. Wheeler*, 3 Burr. 1256.

5. The court ordered an attachment *nisi* against the town clerk of *Guilford*, and a defendant convicted on the game act, for granting and suing out a replevin of goods distrained for the penalty. But on shewing cause, *Eyre J.* discharged the rule, because it was only a contempt to an inferior jurisdiction of the justices;

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justices; and in that case *B. R.* never interposes. *Rex v. Burcott*, 1 *Str.* 567.

6. *Custas brevium* of *C. B.* committed for contempt on not returning an original on a *certiorari*. *Cork v. Baker*, 1 *Str.* 63.

7. Revoking a submission to arbitration, which has been made a rule of court, is a contempt. *Per curiam*. *Rex v. Burridge*, 1 *Str.* 593.

8. So if a release be procured from a noiminal plaintiff in ejectment. In *Mr. Gibbons'* case, he pleaded such a release *puis darrein continuance*, and Lord *Trevor*, who tried the cause, said he was bound to allow the plea, if they insisted upon it; but at the same time told them, he would lay them by the heels; upon which the plea was withdrawn. *Ibid.*

9. Assigning for error the death of the plaintiff in ejectment is a contempt, for, *per curiam*, it was to defeat the proceedings instituted by the court to try the right. *Moore v. Goodright*, 2 *Str.* 899.

10. A copy of a bill of *Middlesex* was served on the defendant whilst he was attending the sittings in a cause wherein he was defendant. And upon motion against the attorney for a contempt, it was contended to be right, because it was not an arrest, which restrained him of his liberty. But the court said, the privilege was designed as well to prevent any interruption of the business of the court, and it was equally a contempt. And they would have committed the attorney if he had not consented to waive the proceedings and pay costs. *Cole v. Hawkins*, 2 *Str.* 1094.

11. An attachment for contempt granted against *Rolfe Bailey*, an attorney, for not obeying a *subpœna* on tender of his charges. 2 *Str.* 510. 810. 1054. *Ld. Raym.* 1528. *Barnes*, 33. *S. C.* and the cases there cited.

12. A *mandamus* was directed to the two bailiffs; one of which was for obeying the writ, and the other would not, nor join in a return. And the court granted an attachment for contempt against both, for they said it would be endless to try in all cases which was in the right, and it would be always used for a handle of delay. *Case of the Bailiffs of Bridgnorth*, 2 *Str.* 808.

13. Under-sheriffs held in contempt, and fined and imprisoned, for not properly executing that part of the sentence of the court which condemned defendant to the pillory. *Rex v. Beardmore*, 2 *Burr.* 792.

(C) Concerning (Things done or spoke in Court <sup>14 Vin. 364.</sup> to) Judges. What shall be said an Offence punishable.

1. IF an attorney use contemptuous words in court, he may be suspended, and shall not be restored till submission. 1 *Bl. Rep.* 222.

2. The defendant presented a petition to the common council of *London*, and used contemptuous words of this court (*B. R.*) at

the same time. For the petition the court granted an information against him and those who signed it, and for the contempt, an attachment. *Rex v. Barber, ib. 444.*

*Qs.* If an attachment goes absolutely where the contemptuous words spoken are sworn to by one witness only; the rule in Chancery requiring two affidavits to deprive the party of the benefit of shewing cause. *Vide 2 Str. 1068.*

3. For contemptuous words spoken of the court, an attachment goes without a rule to shew cause. *Anon. 1 Salk. 84.*

*Quere,* Whether a justice of peace can commit for a contempt of him when not sitting in court? *Vide Petit v. Addington, Peake's N. P. 62.*

14 Vin. 367.

### (E) Conspirators.

1. IF the parties concur in doing the act, although they were not previously acquainted with each other, it is conspiracy.—Lord MANSFIELD, in the case of the prisoners in the King's Bench. See also *Rex v. Cope and others, 1 Str. 144.*

2. On an indictment for wickedly and unlawfully conspiring to accuse another of *taking hair out of a bag*, without alleging it to be an *unlawful* and *felonious* taking, Lord MANSFIELD declared, that the indictment was well laid; for the gist of the offence is the *unlawful conspiring* to do an injury by a false charge. *Rifpal's case, 1 Blac. Rep. 368. 3 Burr. 1320.*

3. An indictment lies for conspiring to pervert the course of justice, by producing a false certificate, by justices of peace, that an indicted highway is in repair, in evidence, to influence the judgment of the court. *Rex v. Mawbey, E. 36 Geo. 3. 6 Term Rep. 619.*

4. In stating such a crime in an indictment, it is not necessary to set forth that the defendants knew, at the time of the conspiracy, that the contents of the certificate were false; it is sufficient that, for such purposes, they agreed to certify the fact as true, without knowing that it was so. *Ibid.*

14 Vin. 368.

### (H) For what Offence (a Man) may be indicted.

1. THERE can be no doubt but that all capital crimes whatsoever, and also all kinds of inferior crimes of a *public nature*, as misprisions, contempts, disturbances of the peace, oppressions, and all other misdemeanors whatsoever of a public evil example against the *common law*, may be indicted; but no injuries of a *private nature*, unless they in some way concern the king. *2 Hawk. P. C. 210.*

2. An indictment lies for obstructing an officer in the execution of his duty.—In such an indictment for obstructing an excise officer in seizing of soap, it is necessary to shew that he had a warrant. *Rex v. Brady, Excheq. Cham. M. 38 Geo. 3. 1 Bos. & Pull. 187.*

3. Taking

3. Taking up dead bodies, even though for the purpose of dissection, is an indictable offence. *Rex v. Lynn*, *M.* 29 *Geo.* 3. 2 *T. R.* 733.
4. Constable of the night is guilty of an indictable misdemeanor in suffering a street-walker, delivered to his custody by one of the nightly watch, to escape. *Rex v. Bootie*, *T.* 32 & 33 *G.* 2. 2 *Burr.* 864.
5. Indictment lies for refusing to execute the office of constable. *Rex v. Lone*, *M.* 5 *G.* 2. 2 *Str.* 920.
6. For not taking upon him the office of overseer, when appointed; for the disobeying an act of parliament is indictable upon the principles of the common law. *Rex v. Jones*, *M.* 14 *Geo.* 2. 2 *Str.* 1146.
7. For saying of a justice of peace, "you are a rogue and a liar." *WEARG* moved, after verdict, in arrest of judgment, that though the justice might have committed him for the contempt, yet the words are not indictable, since it is not to be presumed they would provoke a justice of peace to a breach of the peace, which is the reason why indictments have been held to lie for words. *Sed per curiam*, the allowing that he might be committed shews they were indictable. It is true the justice may make himself judge and punish him immediately; but still, if he thinks proper to proceed less summarily by way of indictment, he may; the true distinction is, that where the words are spoken *in the presence* of the justice there he may *commit*; but where it is *behind his back*, the party can be only *indicted* for a breach of the peace. *Rex v. Revel*, 1 *Str.* 420.
8. Where a statute forbids the doing of a thing, the doing it wilfully is indictable, although without any corrupt motive. *Rex v. Sainbury*, 4 *T. R.* 457.
9. An indictment lies against the overseer of the poor, for refusing to receive a pauper removed by order of two justices, under 13 & 14 *C.* 2. c. 12. *Rex v. Davis*, *M.* 28 *G.* 3. 2 *Burr.* 799.
10. Also against a parishioner for not doing his highway labour. It was objected in this case, that as a particular remedy is appointed by this statute of 22 *C.* 2. c. 12., and that this being a new offence created by that statute, that particular remedy ought to be pursued, and that *indictment* would not lie. *LORD MANSFIELD*. It was an *offence indictable* before the appointment of the summary remedy prescribed by the stat. 22 *C.* 2.. Therefore the summary jurisdiction is *cumulative*, (although there is another remedy given,) and does not exclude the common-law remedy. *Rex v. Boyall*, 2 *Burr.* 834.
11. But indictment lies not upon an act of parliament which creates a new offence, and prescribes a particular remedy. *Rex v. Wright*, 1 *Burr.* 543.
12. Where a new offence is created by an act of parliament, and a penalty annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he

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may *indict* on the prior cause as for a misdemeanor. *Rex v. Harris*, 4 T. R. 202.

13. The stat. 26 Geo. 3. c. 6. §. 1. enacts, that all persons going on board ships coming from infected places, shall obey such orders as the king in council shall make, without annexing any particular punishment; the disobedience of such an order is an indictable offence, and punishable as a misdemeanor at common law. *Ibid.*

14. Where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant ale-licences, their jurisdiction attaches so as to exclude the other appointing a subsequent meeting: though they may all meet together the first day; and if after such appointment the other set of magistrates meet on a subsequent day, and grant other licences, their proceeding is illegal, and the subject of an indictment. *Rex v. Sainsbury*, M. 32 G. 3. 4 T. R. 451.

15. Indictment lies for carrying on works (as Dr. Ward's *aquafortis* works), which impregnate the air with noisome and offensive smells. Per Lord MANSFIELD, *unwholesomeness* is not essential; it is enough if the smell be so *offensive* as to render the enjoyment of life and property *uncomfortable*. *Rex v. White and Ward*, E. 30 G. 2. 1 Burr. 333.

16. Indictment lies for selling by false weights, *Rex v. Crookes*, 2 Burr. 1841.

17. So for selling coals by false measure. *Rex v. Osborn*, *ib.* (n).

18. But such private unfair dealings (unattended with the circumstances of false tokens, or false weights and measures, or conspiracy) are *not indictable*; as delivering a less quantity of beer for a greater, or selling an unsound horse as and for a sound one. The true distinction is this. In all such *impositions* or *deceits*, where *common prudence* is sufficient to guard a person from suffering, the offence is *not indictable*, but the party is left to his *civil* remedy; but where such methods are taken to cheat and deceive as a person cannot by ordinary care or prudence guard against, (as false weights and measures, or false tokens), there it is an *indictable offence*. *Rex v. Wheatley*, H. 1 G. 3. 3 Burr. 1125.

19. For not repairing a highway, indictment lies. *Rex v. The Inhabitants of Harrow*, 4 Burr. 2091. 5 *ib.* 2700.

20. For obtaining money under false pretences, *Vide* stat. 30 Geo. 2. c. 24. See also *Young v. The King*, in Error. 3 Term Rep. 98.

21. An indictment lies for maliciously vilifying the memory of one who is dead. But such an indictment must allege that it was done with a design to bring contempt on the family of the deceased, and to stir up the hatred of the king's subjects against them, and to excite his relations to a breach of the peace, otherwise it cannot be supported. *Rex v. Topham*, H. 31 G. 3. 4 Term Rep. 126.

22. Indict-

22. Indictment lies against a bankrupt for secreting his effects. *Vide Frith's case, Cas. in C. L.* 12.

(H. 3) What Offences are indictable by Statute. 14 Vin. 371.

1. **I**F a statute enjoin an act to be done, without pointing out any mode of punishment, an *indictment* will lie for disobeying the injunction of the legislature. *Rex v. Davis, Sayer, 133.*

2. And this mode of proceeding in such case is not taken away by a subsequent statute, pointing out a particular mode of punishment for such disobedience. *Rex v. Smith and others*, 2 Dougl. 441.

3. For the court of *King's Bench* cannot be ousted of its common-law jurisdiction without *negative words*, or *necessary implication*. *Cates v. Knight*, 3 T. R. 442. See *ante*, (H), and *vide* also *Hartley v. Hooper*, Cowp. 524. 2 Burr. 805. 834. *Rex v. Harris*, 4 T. R. 202.

4. The power of two justices, under the stat. 13 Geo. 3. c. 78. f. 16., to order *any highway* to be widened, extends to roads repairable *ratione tenuræ*; and, upon disobedience to such order, the party may either be proceeded against summarily under the statute, or by indictment. *Reu v. Balme et al.* 2 Cowp. 648.

5. Where there is no appropriation of a statute penalty, it is a debt to the crown, and suable for in a court of revenue, and not by indictment. *Rex v. Malland*, 2 Str. 827.

(H. 4) Taken in what County. Where the Offence <sup>14 Vin. 372.</sup> was done in several Counties.

1. **I**T hath been holden, that if a person who has taken goods by robbery or burglary in one county be indicted for larceny of those goods, and they are found to be of the value of ten-pence only, he shall have his clergy in the *foreign county*; although if he had been indicted of the robbery in the *proper county*, he would have been excluded from clergy. 1 *Hale*, 536. 1 *Hawk. P. C.* 230. Vide 2 & 4 *Will. & M. c.* 1 & 9.

2. Murders and felonies committed in any part of *Wales*, may be tried in the next *English* county. *Althoe's case*, 1 *Str.* 553.

Summer affizes, 1782, for stealing from a ship, stranded in Glamorganshire, an objection was made by the prisoner's counsel, that *Hertfordshire* was not the next *English* county; but it was over-ruled by the Judge, and *Webb* was convicted and executed.—See the Indictment Cro. Clr. Af. 510.

3. It is enacted by 2 Geo. 2. c. 21. "That where death shall  
" happen in *England* from any cause feloniously given out of  
" *England*; or where the felonious cause shall be given in *Eng-*  
" *land*, and the death ensue in any place out of *England*; an in-  
" dictment thereof found by the jurors of the county in which  
" either the death or the cause of the death shall respectively hap-

"pen,



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“pen, shall be as good and effectual in law, as well against the  
“principals and accessaries, as if the offence had been com-  
“pleted in the same county where such indictment shall be  
“found,” &c.

4. By 13 G. 3. c. 31. §. 4. persons who shall have stolen money, &c. in either part of the united kingdom, may be indicted for theft where the property is found upon them.

5. So by §. 5. the receivers of money, &c. in either part of the united kingdom; knowing, &c. are triable where the property is received, though not originally stolen there:

(H. 5) In what Cases. Where the Thing in which the *Offence* consists is only prepared, or inchoate or intended, but not executed.

1. *PER* Lord Holt. The advising one to rob or kill, *without something be done thereupon*, is not indictable. *The Queen v. Daniel*, 6 Mod. 99. But if a meeting be to rob or kill, it may be indictable. *Ib.*

2. To *persuade* an apprentice to embezzle his master's goods is an indictable offence; but the indictment must positively aver that he did take away the goods in consequence of such persuasion. *The Queen v. Collingwood*, 6 Mod. 288. 2 *Ld. Raym.* 1116.

3. *Agreeing* to give a person a sum of money to prove a deed to be forged, for the purpose of obtaining a verdict, is a criminal offence. *Rex v. Johnson*, E. 30 C. 2. 2 *Show.* 1.

4. An information for *attempting* to suborn a person to prove a deed *false*, is good, without alleging that the deed was *true*. *Ibid.*

5. In *Rex v. Reyl*, which was an indictment for a conspiracy to charge a man as the father of a bastard, it was objected that without an act done it was no crime, and that the indictment alleged nothing but that the defendants conspired to tell the prosecutor that he was the father of the child of which *E. was enfeint*. But judgment was given for the crown. 2 *Ld. Raym.* 1167.

6. The same kind of objection in *Rex v. Kennerley and Moor*, where it was urged that bare words, charging *A.* that he *conatus fuit rem veneream habere* with the defendant, and so to commit an unnatural crime, were not a sufficient overt act, without alleging something actually done towards putting the conspiracy in execution. But the objection was unanimously over-ruled, and several instances were mentioned of *attempts* to commit felonies being punished as misdemeanors. 1 *Stra.* 193.

7. The bare having coining tools in possession, with intent only to use them, was holden indictable: *per curiam*, here the *intent* is the offence; and the having in his custody, is an act that is the evidence of that intent. *Rex v. Sutton*, 2 *Stra.* 1073.

8. The *promising* money to a member of a corporation to induce him to vote for the election of a mayor, is an offence for which

which an information will lie. *Rex v. Plympton*, 1 *Ld. Raym.* 1377.

9. The same principle governed the case of *Rex v. Vaughan*, where an information was granted against the defendant for attempting to bribe a privy counsellor to procure him an office in the colonies. 4 *Burr.* 2494.

10. In the case of *Rex v. Scofield*, it was holden, that the attempting to set fire to a man's house, which is only a misdemeanor, was itself a misdemeanor *per se*, as much as an attempt to commit felony, though differing in degree. There, indeed, was an act done; but another case was there cited, before Adams B. at *Sbrewsbury*, where an indictment charged a defendant with an attempt to suborn one to commit perjury; which, upon reference to the Judges, was unanimously holden to be a misdemeanor. *Cald.* 397.

11. In an indictment on 7 G. 3. c. 70. making it felony to endeavour to seduce a soldier or sailor from their duty, it is sufficient to charge an endeavour, &c. without specifying the means employed. *Rex v. Fuller*, M. 38 G. 3. 1 *Bof. & Pull.* 180.

(H. 8) Good or not in respect of the Place where or before whom taken, or where the Fact is alleged to be done. 14 Vin. 376.

1. ON an indictment, stating that the defendant, late of *Woolhampton* in the county of *Berks*, with force and arms, at the parish aforesaid, in the county aforesaid, made an assault on *J. W. &c.* a motion was made in arrest of judgment, on the ground that no proper venue was laid. It did not appear where the offence was committed; the indictment only stated it to be at the parish aforesaid, no parish having been before mentioned, *Woolhampton* not being described as a parish. BLACKSTONE *contra*, insisted that it must be taken upon the face of the record, that *Woolhampton* was a place from which a venue might come; especially as the offence is laid at the parish aforesaid, and no other place was before mentioned, which shews *Woolhampton* to be a parish. But THE COURT said, they inclined to think the objection fatal. They said they could not intend any thing concerning *Woolhampton*, because there was no occasion on the trial to prove what place it was. But there ought, on the face of the record, to appear some certain venue; whereas here the offence was only laid at the parish aforesaid, and no parish was before mentioned. *The King v. Matthews*, H. 33 G. 3. 5 *T. R.* 162.

2. The defendants had been convicted of a nuisance, in erecting buildings, and there making acid spirit of sulphur. The indictment run thus: that "at the PARISH of *Twickenham*, &c. near the king's common highway there, and near the dwelling-houses of several of the inhabitants, the defendants erected," &c.

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an objection was taken in arrest of judgment, that the indictment was laid *generally* at the PARISH of *Twickenham*, and only said *near* the common highway; but not said to be in the *town* or *village*. But, *per Lord Mansfield*, It is *sufficiently* laid, and in the accustomed manner. The very *existence* of the nuisance depends upon the number of houses and concourse of people; and this is *matter of fact* to be judged by the jury. *Rex v. White and Ward*, E. 30 G. 2. 1 *Burr.* 333.

3. If there be two vills in a parish, the indictment need not shew in which of them the defendant lives. *Sayer*, 119.

4. It seems to be agreed that a mistake of the place in which an offence is laid, will not be material upon the evidence on "not guilty" pleaded, if the fact be proved at some other place in the same county. 4 *Hawk. P. C.* 47. *f.* 84.

5. If the fact is laid to be done in a city or county in itself, but which are not co-extensive, it must say, 'within the city and county of E., &c.' *Rex v. Bunce*, E. 11 G. 2. *Andr.* 162.

6. An indictment against the parish of B. for not repairing a road leading from A. to B. is *exclusive* of B., and therefore bad; and it is not aided by a subsequent allegation, *that a certain part of the same highway in B. is in decay*, &c. *Rex v. Gamlingay*, H. 30 G. 3. 3 T. R. 513.

### 14 Vin. 378. (H. 10) Good or not in respect of the *Time* when taken, and setting forth of the *Fact*.

1. IT is not necessary to mention the *hour* in an indictment. 4 *Hawk. P. C.* 44.

2. In BURGLARY the *hour* is usually mentioned, in order to shew that the offence was committed in the night-time; and in *Rex v. Waddington, Lancaster Lent assizes 1771*. Mr. Justice Gould held an indictment for burglary insufficient because the *hour* was omitted. *Ibid.* (n).

3. Where the caption of the indictment states the court of Quarter Sessions, where such indictment was found, to be held on an impossible day, it is fatal. *Rex v. Fearnley*, 1 T. R. 316.

4. Perjury being alleged in the indictment to have been committed in the time of the *late king*, and charged to be against the peace of the *now king*, is fatal, and renders the indictment insufficient, and a conviction therefore *reversed* in the House of Lords, and the defendant discharged therefrom. *Rex v. Lookup*, 3 *Burr.* 1901.

5. It is agreed, that a mistake in not laying the offence on the very same day on which it is afterwards proved upon the trial, is not material upon evidence. 4 *Hawk. P. C.* 46. *f.* 81.

6. *Time* and *place* must be added to every material fact in an indictment. *Rex v. Holland*, 5 T. R. 607.

7. Though the *time* in a temporary statute be expired, yet if it be continued, the fact may be laid to be done by virtue of the first law;

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law; for when an act is continued, every body is estopped to say it is not in force. *Rex v. Morgan, M. 10 G. 3. 2 Str. 1066.*

8. An indictment must be in the present tense, that the jury *do*, and not *did* present. *Rex v. Bunce, And. 162.*

### (K) Uncertainty in the Offence *too general.*

14 Vin. 387.

1. **A** Common and turbulent brawler, a sower of discord among her neighbours, so that she hath stirred, moved, and incited divers strifes, controversies, quarrels, and disputes amongst his majesty's liege people, *contra pacem, &c.* is too general. None but a barretor and a common scold are indictable by general words. *Rex v. Cooper, H. 19 G. 2. 2 Str. 1246.*

2. Indictment against defendant for a nuisance, charging that he *semper levavit vel levare causavit.* And, on demurrer, judgment was given for the defendant, on account of the uncertainty of the charge. *Rex v. Stoughton, E. 4 G. 2. 2 Stra. 900.*

3. Charging an officer with a breach of order in not prosecuting a war "with all possible vigour and decision," is too uncertain, even though the charge be made in the very words of the order given to him. *Rex v. Holland, E. 34 G. 3. 5 T. R. 607.*

4. Indictment for words spoken of a justice in the execution of his office, must specify what they were; and, if for obstructing him in his duty, must shew by what act. *Rex v. How, E. 12 G. 2. Stra. 699.*

5. On an indictment on 5 *Eliz. c. 4.* if it is averred a trade used in *Great Britain*, instead of *England*, it is bad. *Rex v. Lister, M. 1 G. 2. 2 Stra. 788.*

6. An indictment for perjury, not shewing in what manner and in what court the false oath was taken, is insufficient; because, for what appears, it might have been extrajudicial. *Rex v. Aylett, 1 T. R. 60.*

7. If an indictment be for a forcible entry, there ought to be a positive charge of disseisin. *1 Ld. Raym. 610.*

8. Indictment *quia male et negligenter se gessit in execution of the office of constable*, quashed for being too general. *Rex v. Winteringham, 1 Stra. 2.*

9. So, for deceiving one *D.* of several lottery orders, *viz. de scriptis bonis et catallis of D. decipiebant et defraudebant.* *Ib. 8.*

### (N) Uncertainty.

14 Vin. 386.

1. **F**RANCIS Morris was indicted as a receiver. The indictment stated, "he the said Thomas Morris, well knowing," &c. But the indictment was held good, and the words "the said Thomas Morris" rejected as surplusage. *Morris's case, Cases in C. L. 103.*

2. But

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2. But where an indictment contained *two counts*, one for stealing a *bank note*, and the other for stealing a *pocket book*; and the same indictment charged *Mary Graham* with knowingly receiving them, and the stealers were found guilty; held bad on the *last count only*, and *Mary Graham* was found guilty of *the offence aforesaid*. This was held bad; for it is uncertain to which offence this finding refers. *Graham's case*, *Caf. C. L.* 82.

3. So also an information charging two distinct offences, if the offender is convicted of the *said offence*, it is insufficient. *Rex v. Salomons*, 1 *T. R.* 249.

4. Conviction under 22 *Geo. 3. c. 47.* for insuring a ticket in the lottery, authorised by 25 *G. 3.*, quashed, because the information did not state that it was a ticket in *the state lottery*. *Rex v. Trelawney*, *E. 26 G. 3.* 1 *T. R.* 222.

5. In an information, the charge that the defendant, under colour of his office of clerk of the market, did illegally cause his agents to demand and receive of *several other persons several other sums of money*, is too general, and for this the judgment was arrested. *Rex v. Role*, 2 *Stra.* 999.

6. An indictment for murder must aver that the prisoner gave the deceased a mortal wound. *Lad's case*, *Cases in C. C.* 112.

7. It is an incontrovertible rule, that "*in an indictment nothing material shall be taken by intendment or implication.*" 4 *Hawk. P. C.* 31. *f.* 60.

8. In a criminal charge, there is no latitude of intendment to include more than is charged; the charge must be explicit enough to support itself. *Rex v. Wheatley*, 2 *Burr.* 1127.

9. In indictments *figures* must not be used, especially in material parts. *Rex v. Haddock*, *Andr.* 145.

10. An indictment for selling bread, not having *debitum pondus*, is too general. *Rex v. Flint*, 1 *Ld. Raym.* 442.

11. In some cases it is not necessary to specify the particular acts which constitute the offence. As, in *Rex v. Eccles and others*, *M. 24 G. 3. B. R.* the defendants, who had been found guilty of a conspiracy, moved in arrest of judgment, because the indictment merely stated that they had conspired together *by indirect means* to prevent one *H. B.* exercising the trade of a tailor, without setting forth the means used; but the court over-ruled the objection, saying that it was sufficient to state the conspiracy and its object.

12. So in an indictment on stat. 37 *G. 3. c. 70.* it is sufficient to charge the defendant with *having endeavoured* to seduce persons serving in his majesty's forces by sea or land from their allegiance, and to incite them to mutiny, without setting forth the means employed. *Rex v. Fuller*, *Bof. & Pull.* 180.

(O) Things of Form.

14 Vin 389.

1. IF the offence be prohibited only by *statute*, the indictment ought to conclude *contra formam statuti*. But an indictment for that which is an offence *at common law*, as for obstructing the execution of an act of parliament, need not, and ought not to conclude *contra formam statuti*. *Rex v. Smith et al.* T. 20 G. 3. 2 Dougl. 445.

2. In an indictment for an offence at common law, a conclusion of *contra formam statuti* may be rejected as surplusage. *Rex v. Matthews*, H. 33 G. 3. 5 T. R. 262.

3. An indictment for a nuisance might conclude, *ad commune nocementum* of all the king's subjects. 2 Stra. 688.

4. Indictment for a riot, and riotously taking away two water-engines; after verdict *pro rege*, it was moved in arrest of judgment that there was no *vi et armis*. *Sed PER CURIAM*, The *rioteuse ceperunt, fragerunt, et prostraverunt*, implies a force, and the indictment is well enough. *Rex v. Wynd et al.* 2 Stra. 834.

5. An indictment finding that a person hath feloniously broken prison, without shewing the cause of his imprisonment, &c. by which it may appear that it was of such a nature that the breaking might amount to felony, is insufficient. 4 Hawk. P. C. c. 25. f. 57. and vide 2 Stra. 1226. 1268.

6. In an indictment for perjury, on the 5 Eliz. c. 9., the word *wilfully* is essential, and must be inserted, because the term *wilful* in the statute is a material description of the offence; but it is not necessary in an indictment for perjury at the *common law*. *Cox's case*, *Cases in C. L.* 82.

7. Indictment on the Black Act for shooting at any person, must pursue the words of the statute, and charge the offence to have been done "*wilfully and maliciously*;" the omission of these words is fatal to its validity. *Davis's case*, *Cases in C. L.* 556.

8. An indictment of felony must allege the offence to be done *feloniously*. An indictment of burglary must lay that the party "*feloniously and burglariously did break and enter*." High treason must be laid to be done *traiterously*; petit treason *feloniously and traiterously*; for though a party be acquitted of petit treason, he may be convicted of murder or manslaughter. 2 Hale's P. C. 184.

(S) Quashed. In what Cases, and for what Faults. 14 Vin. 396.

1. *EDWARD Frith*, a bankrupt, was indicted at the *Old Bailey* Session, 1738, for secreting his effects. The prisoner's counsel raised four objections to the validity of the indictment, all which the court held to be good; and the indictment, consequently, vicious. The prosecutor then moved, that the indictment

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ment might be quashed; but THE COURT said, it was by no means proper to encourage the quashing of indictments *after prisoners have pleaded*. The motion was accordingly refused; and the prisoner being put upon his defence, an acquittal was entered. *Frith's case, Cases in C. L.* 12.

2. The court will not give leave to quash an information filed *ex officio* by the Attorney-General. He may stop the proceedings upon it by *noli prosequi*, and file another. *Rex v. Stratton et al.* 1 Dougl. 239.

3. The court may use a discretion, either to quash an indictment on motion for insufficiency, or put the defendant to demur to it: but after verdict they are bound to arrest the judgment, if they see the charge to be insufficient. 2 Burr. 1127.

4. Motion for the prosecutor to quash his own indictment is not of course, especially if he has put the defendant to expence, or been guilty of unnecessary or affected delay. *Rex v. Webb, E.* 4 G. 3. 3 Burr. 1468.

5. An indictment for perjury was removed by *certiorari*, and the defendant paid costs for not going on to trial. The prosecutor afterwards moved to quash it, which the court refused, unless he would submit to pay costs. *Rex v. Moore, 2 Stra.* 946.

6. The court will not quash an indictment for a nuisance, but leave the party to demur to it. *Rex v. Bishop, E.* 11 Geo. 2. Andr. 220.

7. An indictment at the quarter sessions for perjury at common law, was quashed for want of jurisdiction. *Rex v. Bainton, 2 Stra.* 1088. *Rex v. Fearnley, 1 T. R.* 316.

8. In the case of felony, if it appear, before the prisoner has pleaded or the jury are charged, that he is to be tried for *separate offences*, the Judge in his discretion may quash the indictment. 3 T. R. 106.

9. Indictment against six jointly and severally for exercising a trade, quashed, because there ought to be distinct indictments. *Rex v. Weston, 2 Stra.* 623.

14 Vin. 400.

### (U. 3) Indulgence to Persons indicted.

1. **B**UT now, by 20 Geo. 2. c. 30. it is enacted, "That all  
 " and every person and persons whatsoever, *who shall be*  
 " *impeached by the Commons of Great Britain* of any high treason,  
 " whereby any corruption of blood may or shall be made to any  
 " such offender or offenders, or to any the heir or heirs of any  
 " such offender or offenders, or for misprision of such treason,  
 " shall be received and admitted to make his or their full defence  
 " by counsel learned in the law, not exceeding two counsel, who  
 " shall be assigned for that purpose, on the application of the  
 " party or parties impeached, at any time after the articles of  
 " impeachment shall be exhibited by the Commons."

2. It

2. It is also enacted, by 6 Ann. c. 21. §. 11. "That when any person is indicted for high treason, or misprision of treason, a list of the witnesses shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode of the said witnesses and jurors (a), shall be also given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted, ten days before the trial, and in presence of two or more credible witnesses."

(a) The case of Lord George Gordon, Hil. term, 21 G. 3. was the first which happened

since this act took effect. The Attorney-General, as the only method of complying with the directions of the act, moved the King's Bench for a rule upon the sheriff, to deliver to the prosecutor a list of the jurymen he intended to return upon the pannel, in order that the prosecutor might be enabled to deliver such list to the prisoner; and the rule was drawn up accordingly, for the terms of which *vide* Douglas, 591.

3. But it is enacted by 6 Geo. 3. c. 53. "That nothing contained in the above last recited act shall anywise extend to any indictment of high treason for counterfeiting his majesty's coin, the great seal, or privy seal, his sign manual or privy signet, or to any indictment of high treason, or to any proceedings thereupon against any offender or offenders who, by any act or acts now in force, is and are to be indicted, arraigned, tried, and convicted, by such like evidence, and in such manner, as is used and allowed against offenders for counterfeiting his majesty's coin."

(W) Abated by what. Misnomer or Addition. 14 Vin. 403.

1. AT the Old Bailey, in July Session 1786, *J. G. Semple* was put to the bar to be arraigned on an indictment of larceny. The indictment stated, "That *James George Harold*, otherwise *Semple*, otherwise *Kennedy*, LABOURER, one chaise, called a "post chaise, of the value of 50*l.*, the goods and chattels of *John Lycet*, feloniously did steal, take, and carry away," &c. Before the prisoner had pleaded, it was moved to quash the indictment, on the ground of informality: the addition being placed after the *alias dictus*, and not after the first name. The Court, upon the authority of *Staundforde*, *Hale*, and *Hawkins's Pleas of the Crown*, directed the indictment and the prisoner to be detained till the next session. *Semple's case*, *Cases in C. L.* 469.

2. But if the prisoner, on his arraignment, plead to the indictment, this error is thereby cured. *Hannam's case*, *ib.* (n).

3. To a plea of *misnomer*, which may be pleaded *ore tenus*, the clerk of the arraigns may reply that the prisoner is known as well by the one name as the other. *Dean's case*, *ib.* 535.

4. Sir *Matthew Hale* says, there is little advantage comes by these pleas to the prisoner; and as to the prosecutor, he recommends, as the safer way, to allow the plea both as to the surname and christian name; for he that pleads *misnomer* of either must  
in



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in the same, set forth what his true name is, and then he concludes himself; and if the grand jury be not discharged, the indictment may presently be amended by them, and returned according to the name he gives himself. 2 *Hale's N. P. C.* 238.

[D]  
24 Vin. 404.

**Indorsement.**

*Ante*, 1 Suppl. tit. *Bills of Exchange*, (H), p. 557. (O),  
*ib.* 567.

[D]  
24 Vin. 407.

**Infidels.**

*Ante*, 4 Suppl. tit. *Evidence* (A), p. 201.

[G]

**Information.**

24 Vin. 408.

(B) For what.

1. FOR attempting to bribe a privy counsellor to procure a reversionary patent of an office grantable by the king under the great seal. *Rex v. Vaughan*, M. 10 G. 3. 4 *Burr.* 2494.
2. For printing and publishing an obscene book. *Rex v. Curl*, M. 1 G. 2. 2 *Stra.* 788.
3. For printing in a newspaper, that A., justice of peace, was scandalously guilty of telling a lie in divers companies, viz. "that defendant had asked his pardon for publishing that A. was to be married to W.;" for giving the lie tends to a breach of the peace. *Rex v. Staples*, T. 11 & 12 G. 2. *Andr.* 228.
4. *Norman*, an attorney, who was a commissioner to take affidavits in B. R., upon an arbitration to end some matter of difference between two persons upon an indictment in that court, examined several persons *ore tenus* upon oath, without putting the matter into writing. *Per tot. cur.* This is such an offence for which

which an information must go. *Rex v. Norman, E/q. B. R. 1 Will. 7.*

5. Information shall go against a justice of peace for committing a man for not paying 1s. for discharging his warrant. *Rex v. Jones, ibid.*

6. Information was granted for these words in a letter to the mayor of *Richmond, viz.* "I am sure you will not be persuaded from doing justice by any little arts of your town-clerk, whose consummate malice and wickedness against me and my family will make him do any thing, be it ever so vile." *Rex v. Waite, ibid. 22.*

7. The court granted an information against the defendant, as for a nuisance, on affidavits of his keeping great quantities of gunpowder, to the endangering the church and houses where he lived. *Rex v. Taylor, 2 Stra. 1167.*

8. Information granted for illegally impressing and confining a recruit. *Rex v. Drew, 1 Stra. 404.*

9. For giving a ludicrous account of a marriage between an actress and a married man. *1 Blac. 294.*

10. If a captain of a man of war refuse to let the coroner come aboard his ship, lying in the body of the county (as in *Portsmouth* harbour), to take an inquisition of one who had hanged himself there, information shall be granted. *Rex v. Solguard, And. 231. Stra. 1097.*

11. If a justice of peace, without whom the sessions could not be held, voluntarily absent himself, information lies. *Rex v. Fox, 1 Stra. 21.*

12. So, if he refuse to put the act *1 G. c. 13.* for taking the oaths, into execution, on application made to him. *Rex v. Newton, 1 Stra. 413.*

13. Information lies for publishing two distinct libels on two distinct persons, one a libel on his son, the other on his daughter, to discredit and disturb him and them. *Rex v. Benfield, 2 Burr. 980.*

14. It lies against the judges of an inferior court, for unduly discharging a debtor out of their prison. Attachment also lies; for it is a contempt. *Per Hardwicke C. J. Moravia's case, T. 8 G. 2. 1 Burr. 135.*

15. The court granted an information against one for refusing to take upon him the office of sheriff, because the vacancy of the office occasioned an interruption of public justice, and the year would be nearly expired before an indictment could be brought to trial. *Rex v. Woodrow, 2 Term Rep. 731.*

16. The court will grant a rule *nisi* for a criminal information at the end of a term against a magistrate for malpractices during the term, but not for any misconduct before the term. *Rex v. C. Smith, M. 37 G. 3. 7 T. R. 80.*

14 Vin. 477.

## (C) In what Cases.

1. *A*, a girl, is put apprentice to *B*., a music-master, by her father, who is bound in 200*l*. for performance of covenants: *A*. is debauched by *C*., *B*. afterwards discharged the indenture, and releases the penalty to the father, and gives her up to *C*. without the father's knowledge, who pays him the penalty of 200*l*., and gives bond that *B*. shall have the profits of *A*'s singing that year. *A*. is indentured to *C*., a gentleman, to learn music of him, and covenants *inter alia* "not to quit his apartment." The articles are executed by all but the father; bond from him for *A*'s performance of covenants is drawn, but not executed, and she goes and lives with *C*. as a kept mistress: information lies against *B*., *C*., and *D*. the attorney who drew the instrument, and was privy to the whole, for a conspiracy. *Rex v. Delaval*, T. 3 G. 3. 3 Burr. 1434.
2. An information lies for contriving to get a young lady out of the custody of her guardian, assigned in *Chancery*, and marrying her; though she voluntarily went into a coach prepared for the purpose of carrying her off. *Rex v. Lord Ossulston et al.* 2 Stra. 1107. Andr. 310. S. C.
3. If a statute makes a thing criminal which was lawful before, an information lies for an attempt to do it; as when going to *France* during a war, without licence, was made high treason, an attempt to go to *France* was considered a great misdemeanor, for which an information lay. 3 Com. Dig. 520.
4. A criminal information having been granted against the defendant, he, before the trial at *nisi prius*, distributed hand-bills in the assize town, vindicating his own conduct, and reflecting on the prosecutor's. This matter being disclosed to the Judge at *nisi prius* by an affidavit, was held a sufficient ground to put off the trial; and that affidavit being returned to the Court of King's Bench, they granted another information on it against the defendant for such criminal conduct, considering the affidavit taken at *nisi prius* as taken under the authority of this court. *Rex v. Jolliffe*, T. 31 G. 3. 4 T. R. 285.
5. The court will not grant an information against a magistrate for having improperly convicted a person, unless the party complaining make an exculpatory affidavit denying the charge. *Rex v. Webster*, 3 T. R. 388.
6. A motion was made for an information for sending a challenge by letter. Copies only, not the original letter containing the challenge, were produced. The Court granted the rule, upon reading the copies only, they being sufficiently verified. *Rex v. Chappel*, 1 Burr. 402.
7. For one single act, in usurping an office, an information lies at law, for punishment of the offender, but not on 9 Ann. c. 20., which entitles to costs, and relates only to franchises affecting rights between party and party. *Rex v. Williams*, 1 Burr. 402.
8. If

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8. If justices hold a petty sessions to search for vagrants, and one confesses himself settled at *A.*, and they remove him thither, and he returns the same day, and one of the justices present at the sessions, without summons or oath, convict him; the court will grant an information: *Rex v. Angell*, 1 *Burr.* 124.

9. And, in general, information lies for any offences against the public good, or against the first and obvious principles of common honesty. 4 *Hawk. P. C.* 86. *f.* 1.

## (E) Proceedings in general.

14 Vin. 415.

1. **T**HE court will not stay proceedings in debt on a penal statute after verdict, though no affidavit has been filed that the offence was committed in the county where the action is brought, and within a year before the bringing of it. The stat. 21 *Jac.* 1. *c.* 4. only applies to those penal statutes on which proceedings may be had before the justices of assize, justices of the peace, &c. *Leigh qui tam v. Kent*, 3 *Term Rep.* 362.

2. The court will not grant an information against a magistrate for having improperly convicted a person, unless the party complaining make an exculpatory affidavit, denying the fact. *Rex v. Webster*, 3 *T. R.* 388.

3. If five several rules are obtained for informations against five several defendants, one joint information cannot be filed against them on these rules, though it be for a joint offence. *Rex v. Heydon*, *H.* 2 *G.* 3. 3 *Burr.* 1270.

4. If there is information for perjury on trial of information for a conspiracy, and all parties agree, the court, on consent, may arrest judgment on the conspiracy, and quash the information for perjury. *Rex v. Green*, *Rex v. Roper*, 2 *Stra.* 1072.

5. Information may be quashed on motion, without demurrer, for defect of jurisdiction. *Rex v. Williams*, 1 *Burr.* 385.

6. If the record of an information on a penal statute does not set forth all the things done, as required by 18 *Eliz. c.* 5., and it removed by *certiorari* by the prosecutor before defendant has pleaded, it is not amended by these things appearing in the return, but all proceedings shall be stayed on motion. *Rex v. Holmes*, 1 *Burr.* 365.

7. Where there is a rule to shew cause why an information should not be granted, the affidavits, on shewing cause, may be entitled *The King v. A.* (the defendant.) *The King v. Jones*, 2 *Stra.* 704.

In the case of *Rex v. Robinson*, Esq. Trial 5 G. 3 B. R. the affidavits

produced by the defendants in shewing cause, were not intitled. Mr. Dunning objected to the reading of them. But the court held that they might be intitled or not, on the shewing cause, and the affidavits were read, and the rule discharged. *Vide* 2 *Stra.* 704. *NOTAN'S CASE. in notes.*

*Rex v. Harrison*, 6 *T. R.* 60. agrees with this case of *Rex v. Robinson*; and the above case of *The King v. Jones*, does not contradict either, as it goes only to say that intitling the affidavits shall prevent their being read in shewing cause against the rule nisi. But *Rex v. Pearson*, 313. and *Deven v. Brown*, 3 *T. R.* 601. are *contra*.

## Information.

8. The defendant, who had been arrested for penalties under the lottery act, was discharged on common bail, because the affidavit to hold to bail was intitled, there being no cause then in court. *Rex v. Cole*, E. 36 G. 3. 6 T. R. 640.

9. The court refused to discharge a defendant out of custody, on the ground that the affidavit, on which he had been holden to bail, was intitled in the cause. *Clark v. Cawthorne*, 7 T. R. 321.

10. By *Rules and Orders in the Exchequer*, rule 48. in an information in the *Exchequer* upon seizure, &c. a short note of the names of the parties, the quality of the goods seized, and the day in which the information was exhibited, shall be entered in a book of the clerk of the office, to be prepared for such intent.

11. So, in an information upon a penal statute, there shall be an entry of the names of the parties, and the day of information. *Rules and Orders in the Exchequer*, Rule 48.

24 Vin. 417.

## (F) Pleadings.

1. **A**N information for mooring a merchant ship, at the King's Moorings, on 10 *Ann.*, is good against the master, though it does not aver that he was on board at the time of the mooring. *Horsfeman v. Gibson*, H. 3 Geo. in Sc. Fort. 32.

2. Information upon a statute must set forth every thing requisite to bring the offence within it. As in an information upon the stat. 11 & 12 W. 3. for having *India* silks, it must aver that there were warehouses still continuing at the time of the seizure, and that the goods were not delivered out on security. *Holden v. Weedan*, T. 1724. *Bunb.* 177.

3. *A.* was surety for one of the clerks of *B.* (cashier of the Exchequer), and entered into a bond for the purpose; upon an information of debt upon this bond it was moved for leave to plead double, viz. *non est factum*, and conditions performed, which was granted. *The Attorney-General v. Snow*, Hil. 1721. *Bunb.* 95.

4. On a trial upon an information against the defendant for being concerned in unshipping, &c. contrary to the statute 8 *Anne*, it was objected that one *Russell* had been guilty, on an information of the same nature for the same goods, and was actually in execution in the *Fleet* upon that judgment; and therefore the crown could not have a double satisfaction, and quoted *Moore*, 553. *Noy.* 62. *Cro. Eliz.* 480.; and insisted that in this case an *audita querela* did not lie. REYNOLDS, Ld. Ch. Baron, thought the defendant might have pleaded this matter *puis darrien continuance*; but, however, that *Russell's* being in execution in the *Fleet*, was not a satisfaction to the crown: and so the defendant went into evidence, and on proof it plainly appeared that the witness for the crown was perjured, so Mr. Attorney-General gave it up; and there was a verdict for the defendant. *The Attorney-General v. Popplestone*, Hil. 1731. *Bunb.* 311.

## Inhabitants.

[ D ]

(B) What they may do or claim as such, and how. 14 Vin. 420.

1. **A** Custom for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes in the close of *A.*, at all seasonable times of the year, at their free will and pleasure, is good. *Titch v. Rawlins*, 2 Hen. Blac. 393.

2. The like custom for all persons for the time being, *being in the said parish*, is bad. *Ib.*

3. Action on the case against the *men dwelling in the county of Devon*, for an injury done to plaintiff's waggon, in consequence of a bridge being out of repair, which ought to have been repaired by the county. To which two of the inhabitants appeared for themselves and the rest of the men dwelling in the county, and demurred. Held that the action did not lie; for they are neither a corporation, nor *qua* a corporation, nor have any corporate fund out of which satisfaction can be made. *Russell v. The Men of Devon*. 2 Term Rep. 667.

It is otherwise as to indictments, but this is sanctioned by unbroken usage. *Per* *Ld Kenyon* C. J. *Ib.*

4. No action would have lain against the hundred for not keeping watch and ward before the statute of hue and cry, which gives it; they not being a corporation. *Semb. Jackson v. Inhabitants of Carlesworth*, 1 Term Rep. 72. See also 2 Will. 92.

5. A plaintiff recovering damages against the hundred, under 9 G. 1. c. 22., is entitled to his costs. *Ib.*

See *ante*, 3 Suppl. tit. *Custom* (A), 66. (H), *ib.* 69. pl. 7. (I), *ib.* 70. pl. 3. And *post*. tit. *Prescription*.

## Injunction.

(A) Grantable; in what Cases to stop Proceedings. 14 Vin. 422.

1. **A**FTER a verdict at law, upon a bond of 20 years standing, an injunction was granted. 3 P. Wms. 395. *Mich.* 1735. *Humphreys v. Humphreys*.

2. A bill to stay defendants, who had an interest in the manor of *Tunbridge*, from proceeding at law against the plaintiffs, for building

## Injunction.

building houses on the manor without leave, and praying that defendants might accept of such a compensation as the court should think reasonable; the court refused to continue the common injunction till the hearing. 1 *Atk.* 285. *Mich.* 1738. *Conyers v. Lord Abergavenny.*

In the above case, a bill brought by the defendants had been dismissed, on a suggestion of the plaintiffs, that it was matter determinable at law.

3. Whilst suits were depending here, the plaintiffs indicted the defendant's agents at the sessions, *where they themselves were judges*, for a breach of the peace. The plaintiffs were ordered not to proceed at the sessions till answer or further order. *And it was said by the Chancellor Hardwicke, that there was no restraining power in this court over criminal prosecutions, but that where an action of trespass will lie, the Attorney-General would grant a noli prosequi to a criminal prosecution, and that pende lite this court would stop an action of trespass vi et armis, or an indictment for a forcible entry, pending a suit here for the quieting the possession.* 2 *Atk.* 302. *May* 1742. *Mayor of York v. Pilkington.*

4. Where bond creditors of the ancestor proceed at law against the heir, and others bring a bill in equity on behalf of themselves and the other creditors, and obtain a decree, an injunction shall issue against those suing at law, unless they have first obtained judgment. 1 *Ves.* 211. *Hill.* 1748. *Martin v. Martin.*

5. An injunction was granted to stay trial in actions at law commenced by a corporation for petty customs, till answer, as a defence at law might arise out of the answer. 2 *Ves.* 620. *Trin.* 1755. *Anon.*

6. An injunction, obtained to stay proceedings at law against the principal, was extended to stay proceedings on the bail bond. *Amb.* 32. *December* 1744. *Stone v. Tuffin.*

7. An injunction was awarded to stay proceedings at law for an annuity, on paying all the arrears into court. *Amb.* 242. *Hill.* 1754. *Searle v. Lord Carpenter.*

8. Lessee of a house covenants to repair, with exception as to fire; the house is burnt; the lessee, having insured and received the insurance money, neglects to rebuild, and brought an action for rent, and was restrained from proceeding. *Amb.* 619. *Trin.* 1764. *Brown v. Quilter.*

9. A bond was given for the enjoyment of a collateral matter, an injunction issued against an action commenced upon the bond for the penalty, and an issue of *quantum damnificatus* was granted, that the actual damage incurred only might be paid. 1 *Bro. Ch. Rep.* 418. *Mich.* 1784. *Sloman v. Walter.*

10. Injunction granted to restrain defendant from recovering a demand from one of the plaintiffs, he having represented, on a treaty of marriage with his daughter, that there was no such demand existing. 1 *Bro. Ch. Rep.* 543. 1782. *Neville v. Wilkinson.*

11. The estates of loyalists in *America* were, under the forfeiting acts, confiscated and vested in the states, and to be sold for the payment of the debts of such loyalists convicted as therein mentioned. This is no ground for an injunction to stay an action here upon a bond given by such loyalist before he was convicted. 2 Bro. 11. Mich. 1785. *Kempe v. Antill*.

12. The plaintiff entered into a contract with the justices of the peace of the county of *Northumberland*, at the quarter sessions, to build a bridge. The sum agreed for was paid, and the plaintiff entered into a bond for the performance of the article: the bridge was built, and destroyed by a flood; and the plaintiff refusing to rebuild, having been advised by able engineers that no bridge could be built upon the site, which could stand, an action was brought against him upon the bond; and an injunction was awarded, and an issue *quantum damnificatus* ordered, the sum mentioned in the bond being a penalty. 2 Bro. Ch. Rep. 341. Trin. 1783. *Errington v. Agnesley*.

13. There being a decree for payment of debts, &c. on the suit of the trustees, though the parties had not proceeded under that decree, a creditor was restrained from proceeding at law against the executor. 1 Bro. Ch. Rep. 183, 1782. *Brooks v. Reynolds*.

14. Representatives of mortgagee, after foreclosure, sell the mortgaged premises; and the amount not being sufficient to pay the debt, bring an action on the bond, injunction to restrain their proceeding refused. 2 Bro. Ch. Rep. 125. *Taake v. Hartley*.

15. Where the defendant is abroad, a motion for an injunction to stay proceedings at law must be on special ground. 2 Bro. Ch. Rep. 640. 1789. *Revet v. Brabam*.

16. Where the plaintiff at law is abroad, and an injunction bill filed, and motion that service of the subpoena upon the attorney at law should be good service, an affidavit of the truth of the equity of the bill must accompany the motion for a subpoena. 3 Bro. Ch. Rep. 12. 1789. *Delancey v. Wallis*. See also 3 Bro. 23. *Burke v. Vickers*, S. P.

17. Where there is a bill filed against an executor, and a decree *quod computet*, and that creditors shall come in; if a creditor brings an action, an injunction shall issue to stay trial, as well as execution; but if the action be brought before the bill filed, and he chooses to discontinue, he shall be allowed to prove his costs at law in addition to his debt. 3 Bro. Ch. Rep. 23. 1789. *Goate v. Fryer*.

18. Upon an interpleading bill, it was doubted whether the money ought not to be actually brought into court before the motion for an injunction, though the practice seems to have been, that it has been held time enough, if brought in upon shewing cause against dissolving the injunction. 3 Bro. Ch. Rep. 36. 1789. *Dungey v. Angove and others*.

19. Action at law on a bond given to a trustee, only reciting that the obligor was (on the resignation of obligee's *cestuique trust*) appointed



## Injunction.

appointed to an office, not restrained by injunction; but may be pleaded at law, in order to try whether the consideration was corrupt. 3 *Bro. Ch. Rep.* 57. 1790. *Thrale v. Moss*.

20. The practice of a court of law, compelling a plaintiff on a bond not to take execution beyond his real debt, does not oust a court of equity of its jurisdiction in awarding an injunction. 3 *Bro. Ch. Rep.* 73. 1790. *Codd v. Woden*.

21. An injunction to stay execution and trial, not granted at one motion. 3 *Bro. Ch. Rep.* 87. 1790. *Wright v. Braine*.

22. Affidavits read upon an application for an injunction to restrain execution on a verdict at law, after answer put in. 3 *Bro. Ch. Rep.* 463. 1792. *Yaacs v. Humpage*. See *Bunb.* 30. *Walter v. Ruffel*.

23. Where a bill has been filed for an account, and a creditor comes in before a Master, but afterwards brings an action, a court of equity will enjoin; but where the defendant has not applied in the first instance, it shall be without costs. 4 *Bro. Ch. Rep.* 163. *Hil.* 1793. *Hardenstle v. Chettle*.

24. An injunction extends to prevent a suit against the sheriff, for not paying over money levied by him in the original action before the injunction issued. 2 *Anstr.* 556. *East.* 35 G. 3. *Bolt v. Stanway*. But, in order to bring himself within the protection of the order, the sheriff must comply with the terms of it, by bringing the money into court. *Ibid.* 569.

25. An injunction cannot be extended to reach a person not a party to the suit. 2 *Anstr.* 521. *Hil.* 35 G. 3. *Dawson v. Principles*. *Gadd v. Wooval.* *Ibid.* 555. S. P.

26. Where one restrained, and on replevin made three continuances as bailiff to different persons, an affidavit, stating the only claim to be under one of the persons, and that he had absconded insolvent, will not entitle the plaintiff to an injunction. 3 *Anstr.* 636. *Mich.* 36 G. 3. *Nicholls v. Phillips and others*.

27. On a motion for an injunction, the plaintiff cannot read affidavits to contradict the answer. 3 *Anstr.* 658. *Hil.* 36 G. 3. *Sommerville v. Buckle*.

28. *A.* sued at law on a policy of insurance, which he had made as agent for *B.*, on a motion for an injunction on affidavit of *B.*'s residing abroad, *A.* must have notice. 3 *Anstr.* 686. *Hil.* 36 G. 3. *Beachcroft v. Gordon and others*.

14 Vin. 425. (A. 2) Grantable, in what Cases, to stop Execution, or to stay Waste.

1. UPON a contract to assign to *Smith* 300*l.*, the third subscription in the *S. Sea*, on the 28th of *August*, *Smith* covenanted upon assigning to pay 1050*l.*, for which he gave a bond, and judgment was obtained thereupon in the common pleas; *Smith* filed a bill for an injunction, and obtained it, because the money for which the bond was given was the consideration of the contract;

contract; and this being a mutual agreement, they ought not to be put to cross actions at law. *Bunb.* 75. 1721. *Smith v. Nottingham.* *Vide Bunb.* 84. *Aubrey v. Fitzbought*, as to *S. Sea Contracts*.

2. Where the crown has only a bare reservation of royal mines, it cannot grant a licence to any person to come upon another man's estate to search for mines; but when mines are open, the crown can restrain the owner of the soil from working them, and can either work the mines itself, or grant a licence to others to work them. 2 *Atk.* 19. *Jan.* 1739. *Lyddal v. Weston*.

3. If a man suffer another to build upon his land, without setting up a title till afterwards, the court of chancery will oblige the owner to permit him to enjoy it quietly. 2 *Atk.* 83. *Nov.* 1740. *East India Company v. Vincent*.

4. A rector may cut down timber for the repairs of the parsonage house or chancel, but not for any common purpose. He is also entitled to *votes* for repairing barns and outhouses belonging to the parsonage; and an injunction issued to restrain the rector from cutting down timber in the church-yard till the hearing, except for those purposes. 2 *Atk.* 217. *Nov.* 1741. *Strachy v. Francis*.

5. The court will not grant an injunction to restrain a person from committing a trespass, where it is *temporary* only; otherwise if it has continued so long as to become a nuisance. 3 *Atk.* 21. *Jan.* 1743. *Coulson v. White*.

6. Limitation to *A.* for life, to trustees to preserve contingent remainders, &c. to the first, &c. sons of *A.* in tail; remainder to *B.* for life, remainder to his first, &c. sons in tail. Reversion in fee to *A.*, who cuts down timber, against whom *B.* brought his bill to stay waste. Though *B.* has no right to the timber, yet as he has an interest in the mast and shade, if *A.* should die without sons; and as *B.* could not maintain an action, not having the immediate remainder, the injunction was continued. 3 *Atk.* 94. *June* 1744. *Perrat v. Perrot*.

7. A bill in this court to restrain nuisances extends only to such as are nuisances at law: and the fears of mankind, though reasonable, will not create a nuisance; and a motion for an injunction to restrain the building the small-pox hospital was refused. 3 *Atk.* 756. *Dec.* 1752. *Anon. Baines v. Baker, Amb.* 158. *S. C.*

8. Injunction on a forcible entry granted against the commissioners of the turnpike for digging gravel in land leased to the plaintiff for 21 years, and converted into a garden, 1 *Ves.* 188. *Dec.* 1748. *Hughes v. Trustees of Morden College*.

9. Jointress gives leave to the next in remainder for life without impeachment of waste, to cut timber on the jointure estate; he dying without issue, the remainder-man over in tail having acquiesced in, and encouraged the so doing, shall be restrained from bringing an action of waste against the jointress. 1 *Ves.* 396. *Feb.* 1749-50. *Aston v. Aston*.

10. If a sole right to a ferry appear upon record, the court will grant an injunction before answer, to restrain others from using the ferry-boats there; but there must be full affidavits to shew that  
the

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the plaintiffs keep up sufficient number of ferry-boats. 1 *Ves.* 476. June 1750. *Anon.*

11. Injunction granted against stopping up ancient lights till the right be tried at law, and ordered the scaffold and boards to be pulled down. 1 *Ves.* 543. August 1750. *Ryder v. Bentham.*

12. Injunction to re-erect a nuisance denied. 2 *Ves.* 193. Feb. 1750. *Anon.*

13. Injunction to stay building must be on stopping ancient lights, for which there is a prescription, or on agreement. 2 *Ves.* 451. July 1752. *Morris v. Lessees of Lord Berkeley.*

14. Injunction not granted to stay the use of a marker, for there are remedies at law, by *scire facias* or action. Query, After the right has been established at law. 2 *Ves.* 215. Mich. 1752. *Anon.*

15. Termor of a ground rent may have an injunction against his lessee to stay waste. *Amb.* 105. 1750. *Farrent v. Lee.*

16. Tenant for life without impeachment of waste enjoined from cutting down trees planted for shelter or ornament, or in vistas, planted walks, &c. *Amb.* 107. May 1751. *O'Brien v. O'Brien.*

17. The patron of a living may have an injunction against an incumbent to stay waste: so may the Attorney-General against a bishop. *Amb.* 176. *Knight v. Moseley.*

18. The Court of Chancery will not grant an injunction to stay the working of a colliery, but in case of the breach of an express covenant, or of an uncontroverted mischief. *Amb.* 209. Jan. 1754. *Anon.*

19. Demurrer to a bill for an injunction to restrain the defendants, who were lessees of the plaintiff, from injuring his fishponds, overruled. 2 *Bro. Ch. Rep.* 64. *Earl of Bathurst v. Burden.* 17 May 1786.

20. Bill by the patroness, the ordinary, bishop of the diocese, and churchwardens of the living of *Oxsted*, against the widow of the late incumbent for an injunction to stay waste, during the vacancy, which after some hesitation the Lord Chancellor granted. 2 *Bro. Ch. Rep.* 552. Feb. 1789. *Hoskins v. Featherstone.*

21. Injunction to stay waste refused, where the plaintiff and the defendant in possession were tenants in common; but granted on affidavit of the defendant's insolvency. 3 *Bro. Ch. Rep.* 621. May 1792. *Smallman v. Onions.*

22. Where there was great delay on the part of the vendor, an injunction to stay an action at law brought against the auctioneer for the deposit was refused. 4 *Bro. Ch. Rep.* 496. Mich. 1793. *Lloyd v. Collett.*

23. An injunction was granted to stay an action at law brought against the auctioneer for the deposit, although the estate sold was represented as freehold, with leasehold adjoining, and was in fact almost all leasehold, and although there had been great delay in making out the plaintiff's title. 4 *Bro. Ch. Rep.* 491. Feb. 1794. *Fordyce v. Ford.*

24. An injunction was granted *before* answer to restrain the defendant from proceeding farther in digging a ditch, but the court would not order it to be filled up till *after* answer. 1 *Ves. jun.* 140. *Anon.*

25. Injunction was moved for to restrain the Foundling Hospital from building on land belonging to and surrounding the hospital, on the grounds that the original design was that the hospital should be in the country. 2d, The risk of the undertaking. And, 3dly, that the contracts which the trustees had made with the builders were improvident. The injunction was refused, as there was no breach of trust, or probability of it made out. 2 *Ves. jun.* 43. 1793. *Attorney v. The Governors of the Foundling Hospital*, 4 Bro. 165. S. C.

26. Tenant for life having granted a lease of coal mines amounting to a forfeiture, cannot join the remainder-man in a bill for an injunction. 3 *Ves. jun.* 3. Nov. 1795. *Wentworth v. Turner*.

27. Where a tenant for life, subject to waste, has sold timber, &c. he cannot have an injunction against the vendee to prevent his cutting it. *Ibid.*

28. Where a tenant defending an ejectment brought by his landlord makes default at the trial, and, during the interval, does all the mischief he can, by committing breaches of covenants and wilful waste, an injunction will be granted on motion, or, in the vacation, on petition; but where no ejectment had been brought, it was refused. 5 *Ves. jun.* 259. Feb. 1800. *Lathrop v. Marfb.*

29. Injunction was granted to restrain the landlord from cutting ornamental trees in a lawn during the term, upon his conduct, amounting to approbation of and consent to the tenant's plan of improvement in laying out the lawn. 5 *Ves. jun.* 688. Dec. 1800. *Jackson v. Cator*.

30. Sending a surveyor to mark out the trees was held a sufficient ground for an injunction. *Ibid.*

31. Motion to restrain the defendant, widow and administratrix of the intestate, from disposing of his property in the funds, on the ground of having squandered the real estate, of which she was in possession for the plaintiffs, the children. Granted as to two thirds of the property, the share of the plaintiff. 1 *Anstr.* 174. *East.* 33 G. 3. *Rogers v. Rogers*.

32. Where the principal dispute is as to the *locality* of lands of each, equity will not allow the defendant, after recovering in ejectment, which does not ascertain the land by metes and bounds, to take out execution upon whatever part he shall choose. 1 *Anstr.* 184. *East.* 33 G. 3. *Hardcastle v. Shafto*.

33. When lands are confused, and the plaintiff at law recovers under an instrument, which states the whole to be 25 acres, and that 18 belong to him, whereas in fact the whole is 21 acres only, equity will enjoin him from taking out execution for 18 acres; he must abate in proportion. *Ibid.*

34. The court will not interfere by injunction (in the nature of an order to stay waste) to prevent a breach of contract where no trespass

trespass is committed. *Mish. 39 G. 3. Longman, Broderip and others v. Calliford. 3 Anstr. 645.* Nor to prevent a tenant's selling dung off the farm, contrary to the covenants in a lease. *3 Anstr. 749. June 36 G. 3. Johnson v. Goldswain and others. See vide Geaff v. Lord Belfast, ibid. in notis, contra.*

35. Injunction granted to prevent the negotiating a note obtained at play, upon affidavit, before service of the *subpoena*. *3 Anstr. 851. Hil. 37 G. 3. — v. Blackwood and others.*

14 Vin. 426. (A. 3) Grantable; in what Cases to quiet Possession.

1. **A**N injunction was awarded to restore and quiet the plaintiff and his tenants in the possession of the premises in question; but it was at the same time ordered that he should appear to an ejectment to be brought by the defendant, in order to try the title. An ejectment was accordingly brought, and the defendant obtained a verdict, and was afterwards put into possession; but on appeal it was ordered, that he should be at liberty to bring an ejectment to recover possession of the premises, and that no mortgage should be set up in bar to the title. *3 Bro. Par. Caf. 276. 1726. Seagrave v. Ryan.*

2. It is usual in *Ireland*, for a lessee who has been in possession three years, and is disturbed, to file his bill in the Court of Chancery there, for an injunction to quiet him in possession, till evicted by due course of law; and this usage is founded upon the equity of the statutes against forcible entries; but all bills of this kind must allege, and it must also be proved, that the sole and actual possession is in the plaintiff, and that no ownership or possession is in any other person. *4 Bro. Par. Caf. 128. 1733. Vernon v. Mayer, &c. of Dublin.*

3. Where there is a grant of a new invention by patent, a small variation of the invention will not entitle another to break in upon the patent; and in the case of the grant of the sole printing of a book to the author, who takes whole paragraphs from another book, it is not material; for it may be necessary to introduce what is new. *3 P. Wms. 255. East. 1734. Gibbs v. Cole.*

4. Where a man suffers another to build upon his land, without setting up a title till afterwards, the Court of Chancery will oblige him to permit such person quietly to enjoy. *2 Atk. 83. Nov. 1740. East India Company v. Vincent.*

5. On application for an injunction, it was determined, that the *act 8 G. 2.* for the encouragement of the arts of designing, engraving, &c. is not confined to works of invention only, but means the designing or engraving any thing already in nature; a print published of any building, house, or garden, is within the *act*. And the property of prints vests absolutely in the engraver, though the day of publication be not mentioned; but the property in books does not vest, without being first entered at Stationers'-hall. *2 Atk. 93. Dec. 1740. Blackwell v. Harper.*

6. The

6. The statute 8 *Ann. c. 19.*, for vesting the copies of books in authors, is not a monopoly, but ought to receive the most liberal construction. Books colourably shortened, are within the act; but an abridgment fairly made is a new book, because the judgment of the author is shewn in it. The object of this suit was an injunction to stay printing a book, upon the suggestion that it was borrowed *verbatim* from another work. The court would not send it to law, because it would be absurd for a judge to sit to hear both books read, but said the parties should fix upon two persons learned in the law to read the books, and report their opinion. 2 *Atk.* 141. *March 1740. Gyles v. Wilcox.*

7. Defendant, on the coming in of his answer, moved to dissolve an injunction against his vending a book of letters from *Swift, Pope*, and others: held that a collection of letters, as well as other books, is within the act of *Ann.* And the injunction was continued as to the letters written by *Mr. Pope.* 2 *Atk.* 342. *June 1741. Pope v. Curl.*—*The receiver of a letter has a joint property with the writer, and the possession does not give him a right to publish it.*—*The reprinting a book in ENGLAND, pirated and printed in IRELAND, is an evasion of the act.* S. C.

8. The plaintiff moved for an injunction to prevent the defendant's using the *Mogul* stamp on his cards, suggesting the sole right to be in the plaintiff, having appropriated the stamp to himself, conformably to the charter granted to the card-makers' company by King *Charles the First*; but the court refused the injunction, being of opinion that there was no instance of restraining a trader from making use of the same mark with another. 2 *Atk.* 484. *Dec. 1742. Blanchard v. Hill.*

9. Lessor grants a building lease for sixty-one years, of a house in *Lincoln's-Inn Fields*, to *W.*, who assigns over the lease to the plaintiff for the remainder of the term; plaintiff rebuilds the house, and lays out 500*l.* for that purpose, and pays the rent reserved, *viz.* 40*l.* to the lessor, till his death. On the death of the lessor the defendant became entitled, as first remainder-man in tail; for six years he received the rent, and then brought an ejectment, and recovered at law for want of the usual covenants in the building lease. Plaintiff brought his bill for an injunction, and to be quieted in the possession of the house. The court directed a new lease to be executed with proper covenants, and the plaintiff to hold the premises for the remainder of the term. 3 *Atk.* 692. *March 1748. Stiles v. Cowper.*

10. The stat. 8 *G. 2. c. 13.*, relative to prints, protects only the maker and designer. *Amb.* 164. *March 1753. Jeffery v. Baldwin.*

11. An abstract of a book, published in a magazine, held not to be piracy; especially as the author had published extracts of it in another paper. *Amb.* 403. *March 1761. Doddsley v. Minnerley.*

12. The author of a farce permitted it to be performed, for which he received a premium, but never published it; it was taken down in short hand during the performance. Injunction granted

granted to restrain the printing and publishing it. *Amb.* 694. *Dec.* 1770. *Maclin v. Richardson.*

13. Injunction granted to restrain the printing and publishing private letters, without the consent of the executors of the person who wrote them. *Amb.* 737. *March* 1774. *Thompson v. Stanhope.*

14. An injunction will be awarded against the sale of a book piratically taken from another, but not against a fair abridgment. 1 *Bro. Ch. Rep.* 451. *Trin.* 1785. *Bell v. Walker.*

15. *A.*, having sold to a bookseller a book of roads, which was printed in letter-press, after the expiration of the first 14 years sold it to another, who published the high roads upon copper-plates, and the cross roads in letter-press; as to the last, an injunction was granted. 2 *Bro. Ch. Rep.* 80. *Trin.* 1786. *Carman v. Bowles.*

16. Injunction that the validity of a patent might be tried at law; verdict for the patentee, subject to the opinion of the court upon a case: the court were equally divided; the patentee must bring another action: but the court would not impose any terms upon him, nor dissolve the injunction in the mean time. 3 *Ves. jun.* 140. *June* 1796. *Bolton v. Bull.*

17. The plaintiff published a book of roads of *Great Britain*, comprising *Patterson's Book*, to the copyright of which the plaintiff was not entitled, with improvements and additions obtained by actual survey and otherwise. An injunction to restrain the publication of an edition of *Patterson's Book*, comprising the plaintiff's improvements and additions, was refused. 3 *Ves. jun.* 20. *Nov.* 1799. *Cary v. Faden.*

18. Injunction against a colourable abridgement of the *Term Reports B. R.* among other law reports, till answer or further order, upon certificate of the bill filed. 5 *Ves. jun.* 709. *January* 1800. *Butterworth v. Robinson.*

24 *Vin.* 427.

#### (A. 4) Grantable; in what Cases in general.

1. *SIR Constantine Phipps* moved for an injunction, because the defendant had only demurred to the bill without pleading or answering, which he alleged was only in delay. The court refused to grant an injunction, but ordered the demurrer to be set down to be argued on a short day. *Bunb.* 11. 1717. *Lamb v. Bowes.*

2. Upon an extent an inquisition was taken, which found a term of so much value; the defendant pleaded to the inquisition, and it was found for the crown; and it was insisted for the defendant that the court should order a *venditioni exponas*, but an injunction was awarded to put the crown into possession. *Bunb.* 71. 1729. *Rex v. Rawlins.*

3. An injunction, to quiet the plaintiff in his possession, may be moved for before service of the subpoena to answer. *Bunb.* 110. 1722. *Pearce v. Penrose and others.*

4. Notice

4. Notice of filing exceptions must be two days before you can move for an injunction. *Bunb.* 116. 1722. *Lord Carlisle v. Wyndesfel and others.*

5. Upon an order for time, the plaintiffs immediately moved according to the prayer of the information, which was to enjoin defendants from misapplying money, which was received for the benefit of a corporation, and this, though severe, was granted. *Bunb.* 258. *Attorney-General v. Norris.*

6. Defendant was outlawed; plaintiff obtained a lease from the crown, and moved for an injunction to put him in possession, which was refused. *Bunb.* 261. 1728. *Tiffin v. Jackson.*

7. It was moved that an injunction on an attachment should extend to stay defendants receiving *S. Sea* annuities, which was granted, being according to the prayer of the bill, and the answer not being come in. *Bunb.* 289. 1730. *Terry v. Harrison.*

8. A wife, executrix, was restrained from getting in the assets of her testator, her husband being in the *West Indies*, and out of the jurisdiction of the court. 2 *Atk.* 213. *Of.* 1741. *Taylor v. Allen.*

9. *B.* (the plaintiff) was residuary legatee and surviving executrix of her husband, to whom *C.* and *O.* had given a joint bond. *C.* died, and the plaintiff was indebted, on her own private account, to *O.*, who is a bankrupt. The bill was brought against his assignees for an injunction, and to set off what was due to her as executrix against the debt due from her to the bankrupt; but the injunction was refused, the debts being due in different rights, and are not comprehended in the stat. 2 *G.* 2. 3 *Atk.* 691. *Dec.* 1748. *Bishop v. Church.*

10. The defendant was in this case restrained from negotiating a promissory note, given on a marriage brokerage agreement, till answer or further order. *Amb.* 66. *Of.* 1747. *Sir Edward Smith v. Haytwell.*

11. As to the issuing of commissions to examine witnesses abroad, and the granting injunctions in the mean time, see *Bro. Par. Cas.* 7 vol. 192. *Cojanaul and others v. Verelst*; and 245. *Nicol v. Verelst.* 1774.

12. Injunction against a purchaser on behalf of a creditor, to restrain payment of the purchase-money to the heir. 3 *Bro. Ch. Rep.* 217. *Hil.* 1791. *Green v. Jones.*

13. An injunction is granted on amended bill on special motion, without affidavit, after injunction dissolved on the original bill. 3 *Bro. Ch. Rep.* 425. 1792. *Edwards v. Jenkins.*

14. Injunction to restrain defendant from negotiating a bill of exchange, given for goods not delivered. Issued on certificate of bill filed and affidavit. 3 *Bro. Ch. Rep.* 476. *March* 1792. *Patrick v. Harrison.*

15. Motion granted for an injunction and receiver, for one partner against another, the defendant being in contempt, and being served personally, and not appearing. 4 *Bro. Ch. Rep.* 441. 1793. *Mead v. Bowers.*

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16. Injunction granted against securities obtained by one *French* emigrant against another by arresting him; he was about to sail on an expedition against *France*, and under an obligation entered into in *France* as surety, which, according to the laws of *France*, could not affect the person. 3 *Ves. jun.* 447. *June 1797. Talleyrand v. Boulanger.*

17. Injunction to restrain a breach of covenant, secured by forfeiture of lease and a penalty. 5 *Ves. jun.* 555. *Aug. 1800. Barrett v. Blagrove.*

18. After an injunction dissolved on the merits, the plaintiff cannot, on an amended bill, have another injunction, without a special affidavit of merits, though the defendant be in contempt for not answering. 1 *Anstr.* 188. *East.* 33 G. 3. *Lingham v. Toule.*

14 Vin. 428.

## (A. 5) At what Time it may be granted.

1. AFTER a plea put in, there can be no motion for an injunction till the plea is argued. 3 *P. Wms.* 396. *Mich. 1733. Humphreys v. Humphreys.*

2. A plea must first be removed out of the way, before the plaintiff can have an injunction to stay proceedings at law. 2 *Atk.*

113. *Jan. 1740. Anon.*

14 Vin. 429.

## (B) How, and on what Suggestions and Terms granted or obtained.

1. INJUNCTION granted on behalf of a patentee of a new invention, after the answer came in, on affidavit of the prejudice which would arise from dissolving it. 3 *P. Wms.* 255. *East.* 1734. *Gibbs v. Cole.*

2. After a writ of execution of a decree, and an attachment served on the defendant, the plaintiff may have an injunction to the defendant to deliver possession, and next a writ of assistance, commanding him to be aiding in putting the defendant into possession. 3 *Atk.* 275. *Nov. 1744. Stribley v. Hawkie.* See also 1 *Bro. Ch. Rep.* 376.

3. A plaintiff, where an injunction has been dissolved on the merits or for want of shewing cause, cannot, by amending his bill and defendants obtaining a *dedimus* to take his answer, move for an injunction, but on the coming in of the answer, he may move for an injunction on the merits. 3 *Atk.* 694. *May 1749. Anon.*

4. A proper writ of injunction cannot be granted unless prayed by the bill. *Amb.* 70. *January 1749. Javory v. Dyer.*

5. Injunction dissolved on the merits; plaintiff amends his bill, or brings a supplemental bill for the same matter; he cannot have an injunction till answer. *Amb.* 104. *October 1750. Travers v. Lord Stafford.* 2 *Ves.* 19. S. C.

6. Where a bill is referred for impertinence before the time for answering is out, the plaintiff cannot have an injunction of course, for

for want of an answer; but must move it on notice and affidavit. 1 *Bro. Ch. Rep.* 574. *June 1784. Neale v. Wadeson.*

7. Motion for an injunction to restrain Lord Byron from preventing the water flowing to plaintiff's mill in such regular quantities as it had ordinarily done the 4th of April 1785. The motion was before appearance, and upon affidavits stating Lord Byron's object, from expressions, to exact money from the plaintiff, the motion was granted; but afterwards, upon motion to dissolve the injunction, upon coming in of the answer, the Master of the Rolls refused to let the affidavits be read. 1 *Bro. Ch. Rep.* 589. *May 1785. Robinson v. Lord Byron.* See 2 *Bro.* 90. *Strathmore v. Bowes.*

8. Injunction granted in pressing cases, on petition and affidavit. In the particular case, on converting old houses in London to a purpose dangerous to the public, the Lord Chancellor granted the injunction. 5 *Ves. jun.* 129. *Mayer of London v. Bolt.*

9. On a bill for discovery and injunction, the defendant (plaintiff at law) admitted himself to be a mere agent for the other defendant, and ignorant of the transaction; an injunction was moved for as of course, till the coming in of the answer of the other defendants, who lived abroad; but there appearing a danger of losing other material evidence by the delay, it was refused. 2 *Anstr.* 502. *Mich.* 35 G. 3. *Vandam v. Munro.*

10. On a trust to sell, a suggestion in the bill of improper conduct of the trustees, in not giving sufficient notice of the sale, is not a ground for an injunction to stop the intended sale. 2 *Anstr.* 549. *East.* 35 G. 3. *Sir John Peckel, Bart. v. Fowler and others.*

## (C) To what Court or Place, &c. Injunction lies. 24 Vin. 431.

1. AN injunction was granted to stay proceedings in the Bishop of Ely's court, until answer, where the defendant, as rector of *Gambigla* in *Cambridgeshire*, libelled against the plaintiffs, his parishioners, for tithes; and upon alleging several moduses, the proof of which arose out of the answer, the motion was granted. *Bunb.* 27. 1718. *Abtkorp and others v. Jennings.*

2. An injunction was also granted to stay proceedings in the spiritual court in *Yorkshire.* *Attorney-General v. Starkey.* 1722. *In notis.* See also *Sir Edward Blacket v. Dr. Finney, Bunb.* 176. 1724. And *Salmon and others v. Rake.* 1733. *In notis.*

3. Where there is a trust, or any thing in the nature of a trust, notwithstanding the ecclesiastical court hath an original jurisdiction in legacies, yet equity will grant an injunction. And where the husband of an infant institutes a suit in the ecclesiastical court for her legacy, upon the executors filing a bill, and suggesting this matter to the court, an injunction would be continued to the hearing. 1 *Atk.* 491. *Feb.* 1738. *Anon.*

4. An injunction does not deny, but admits the jurisdiction of the court of common law; the ground on which it issues is, that the court of law exercises a jurisdiction contrary to equity: as where a trustee is suing in the ecclesiastical court for payment of *cessui que trust's* legacy, or where a husband is suing for a portion before settlement made. 1 *Atk.* 516. December 1737. *Hill v. Turner.*

5. A legacy of 800*l.* devised to *E. B.*, payable at 21 or marriage, charged on a fund partly real and partly personal; *she died before 21 unmarried: as assets were admitted*, the court would not grant an injunction to stay proceedings in the ecclesiastical court for the recovery of the legacy. 3 *Atk.* 203. December 1744. *Basset v. Basset.*

6. The owners of two privateers seized upon the ship *Diligence* as lawful prize, it appearing by the captain's papers that she had carried provisions to the enemy; and the captain signed a note, by which he acknowledged that they had very justly confiscated the cargo. The captain of the *Diligence* brings a bill in chancery for an injunction to the court of admiralty to stay a suit pending there on the lawfulness of the transaction, suggesting that some of the papers are lost, and that, if the note, which he was obliged to give, should be produced, he must be cast at law. The injunction was refused; for if it were to be granted upon such pretences, it would defeat the act of parliament relating to prizes; and if the signing of the note were owing to duress, the court of admiralty could suppress it. 3 *Atk.* 350. June 1746. *Anon.*

7. A suit in the ecclesiastical court for subtraction of tithes; the defendant there brings a bill to establish a *modus*, and on the bare suggestion of a *modus* brings a bill for an injunction to stay proceedings in the ecclesiastical court; but the injunction was denied. 3 *Atk.* 628. March 1748. *Rotterdam v. Fanshawe.*

8. Where a suit is instituted in the spiritual court for an infant's legacy, by a father, to have it paid into his hands, the court of chancery granted an injunction. *Ibid.* 69.

24 *Via.* 431.

#### (D) *Perpetual* Injunctions. In what Cases.

1. **PERPETUAL** injunction after five ejectments and two bills in equity. *Bunb.* 158. 1723. *Barefoot v. Tay.*

2. Bill for a perpetual injunction to stay proceedings in the prerogative court, by the Duchess of *Buckinghamshire*, for controverting the will of the Duke of *Buckinghamshire*, which had been proved in this court, and admitted by the duchess in her answer. Injunction made perpetual. 1 *Atk.* 628. October 1739. *Shelfield v. Duchess of Buckinghamshire.*

(E) The Force of an Injunction.

14 Vin. 437.

1. IT is no excuse for proceeding at law after an injunction is granted, that it is not sealed; for where a defendant or his attorney have been present on an order for an injunction being made, and they have proceeded at law before it has been sealed, the court has considered it as a contempt, and committed them for it. 3 Atk. 567. Mich. 1747. Anon.

2. Where an injunction is obtained till the coming in of the answer of one defendant, who resides abroad, the plaintiff is not compellable to bring the money into court, unless on special circumstances. 2 Anstr. 366. Mich. 34 G. 3. Shoulbred v. Macmaster and others.

3. Where an injunction subsists, the court will not grant a commission to examine a witness in India, without a special affidavit of materiality. 2 Anstr. 386. Hil. 34 G. 3. Moody v. Steele.

(F) Dissolved, or made absolute, in what Cases, and how. 14 Vin. 433.

1. UPON exceptions being over-ruled, the injunction is dissolved without motion. Bunb. 30. 1718. Walter v. Ruffel.

2. Simmons filed his bill to be relieved against an award (under the stat. 9 & 10 W. 3. and for the non-performance of which an attachment had issued), suggesting fraud in the arbitrators, and obtained an injunction, exceptions being allowed, defendant had liberty to proceed at law notwithstanding the injunction. Bunb. 182. 1724. Simmons v. Mullins.

3. If defendant does not sign his answer, the injunction will be continued; *sed quare*, if plaintiff takes a copy of the answer, it is not a waiver of the informality. Bunb. 251. 1728. Anon.

4. Injunction continued on behalf of the patentee of a new invention after the answer came in, on affidavit of the prejudice which would arise on dissolving it. 3 P. Wms. 255. East. 1734. Gibbs v. Cole.

5. A point which materially concerns the merchants will induce the court to continue an injunction till the hearing. 2 Atk. 229. Mich. 1741. Green v. Suaffo.

6. Where there was an action brought for money had and received, as attorney for the plaintiff, and the defendant files a bill, in which he admits to have received the money, states that he placed it in the hands of a banker, who had become bankrupt, and had paid two dividends, and prays an injunction, which was obtained for want of an answer; the court ordered the plaintiff in equity to bring the amount of the two dividends into court, or

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the injunction to be dissolved. 1 *Bro. Ch. Rep.* 452. 1785. *Sherwood v. White*. Vide also *Atton v. Market*, 2 *Bro. Ch. Rep.* 14.; and *Culley v. Hickling*, *ibid.* 182.; but it must be on affidavit. See also *West v. Carnevall*, *Coghlan v. Requeneau*, *Potts v. Butter*, and *Mitchel v. Davis*, in *notis.* S. P.

7. Affidavits filed to obtain an injunction to stay waste before answer, not allowed to be read upon motion to dissolve the injunction upon the coming in of the answer. 1 *Bro. Ch. Rep.* 589. May 1785. *Robinson v. Lord Byron*. See also *Strathmore v. Bowes*, 2 *Bro. Ch. Rep.* 90. S. P.

8. Injunction that the validity of a patent might be tried at law; verdict for the patentee, subject to the opinion of the court upon a case, the court were equally divided: the patentee must bring another action; but the court will not interpose any terms upon him, nor dissolve the injunction in the mean time. 3 *Ves. jun.* 140. June 1796. *Bolton v. Bull*.

9. On an injunction obtained, the court will not discharge the plaintiff out of custody, if taken on legal process; but where a party is taken after he has obtained an injunction, but before notice given of it, the detaining him after notice is no contempt. 1 *Anstr.* 36. May 32 G. 3. *Willis v. Daniel*.

10. A conditional consent to proceed at law waives an injunction. 1 *Anstr.* 62. Trin. 32 G. 3. *Grant v. Priddell*.

11. On exceptions over-ruled, the plaintiff cannot move to dissolve an injunction, unless he has obtained a previous order *nisi* for that purpose. 1 *Anstr.* 255. Trin. 33 G. 3. *Dubarry*, in *Scaccario*, otherwise in *Chancery*.

12. On a commission to examine witnesses in *India* not being returned in two years, the court will dissolve the injunction. 1 *Anstr.* 276. July 33 G. 3. *Penny v. Edgar*.

13. After an injunction on the original bill dissolved on the coming in of the answer, the plaintiff cannot have an injunction on the supplemental bill, though supported by affidavits, unless the defendant is in contempt. 2 *Anstr.* 555. East. 35 G. 3. *Gadd v. Worrall*.

14. After an injunction obtained, a demurrer to the prayer for injunction is allowed: yet the injunction cannot be dissolved without the previous order. 2 *Anstr.* 585. Trin. 35 G. 3. *Hurst v. Thomas*.

15. Where an answer is referred for impertinence, it is good ground for continuing the injunction. *Ibid.* 591.

16. Where an injunction is obtained for want of an answer, and an answer afterwards filed, but the defendant does not move to dissolve the injunction till two terms afterwards, and when the bill has been amended, yet the injunction may be dissolved by motion of course. 3 *Anstr.* 651. Mich. 36 G. 3. *Patton v. Pantan*.

17. Where an injunction is obtained on the absence of one of the defendants abroad, on a motion to discharge that order, the answer of the other defendant cannot be read. 3 *Anstr.* 935. Trin. 37 G. 3. *St. John v. Cargill and others*.

(G) Of the Service of an Injunction.

14 Vin. 416.

UPON an injunction bill to stay proceedings at law, the defendant living abroad, a motion that service of the *subpoena* upon the attorney may be good service, requires an affidavit of merits. 4 Vef. jun. 359. Dec. 1798. *Stephens v. Cine.*

Inns and Innkeepers.

[ D ]

14 Vin. 436.

1. THE defendant pleaded (to trover) that he was an innkeeper, that the plaintiff owed him for the keep of his horse at different times more than its value, and therefore he detained and sold it: held bad; for though he might detain he could not sell, except in *London*, by the custom; and he could only detain for what he had then sold to him; not for a former demand. *Jones v. Pearle*, 1 *Str.* 556.

2. The landlord of livery stables, distrained for rent the coach of a stranger, standing at livery in the coach-house there; and after argument, in which it was insisted to be like cloth at a tailor's, or the horse of a guest at an inn, and so protected, the avowant had judgment. *Francis v. Wyatt*, 3 *Burr.* 1498.

(A) Innuendo.

[ G ]

14 Vin. 442.

1. AN innuendo can only explain or apply precedent matter; it cannot add to or extend it. *Rex v. Gripe*, 1 *Lord Raym.* 256.

2. *You are guilty* (innuendo of the murder of *D. D.*) held after verdict a sufficient charge of murder, though the colloquium were only of the death. *Peake v. Oldham, in error*, 1 *Cowp.* 276. And vide 2 *Cowp.* 685.

3. The complaint of the defendant being that he was arrested in returning home after the hearing of a cause, before he got to his own house in the parish of *St. Martin in the Field*, innuendo his house in the *Haymarket* in *St. Martin's, &c.* The innuendo is only a more particular description of the same house, and good. *Rex v. Ayllett*, 1 *T. R.* 69.

4. The oath being that the defendant was arrested upon the steps of his own door, an *innuendo* that it was the *outer door* is good. *Ibid.*

5. An action of slander upon several sets of words; verdict for the plaintiff upon the first and fifth sets of words, damages 40s. The first set were these, *That rogue John Tindall* (meaning the plaintiff) *that set the house on fire* (meaning the summer-house that was burnt in the occupation of one Mr. Cotton), *and if any body will give me charge of him I will carry him to New Prison*. The fifth set of words were, *John Tindall* (meaning the plaintiff) *set the house on fire* (meaning the same house). It was moved in arrest of judgment, that the latter set of words were not actionable, for that every count in a declaration is a substantive count, and the *innuendo* (meaning the same house) shall not relate to the summer-house in the first set of words. *Per curiam*. Although the latter set of words be not of themselves actionable, yet they shall have relation to the former set, and we must take them to have been spoken *maliciously*, as the jury have found for the plaintiff. *Tindall v. Moore. C. B. 2 Wilson, 114.*

7 Vin. 305. (B. a) Writ of Inquiry of Damages: in what Cases awarded; and how it may be.

1. A WRIT of inquiry of damages is a mere inquest of office to inform the conscience of the court; who, if they please, may themselves assess the damages. And it is accordingly the practice in actions upon promissory notes and bills of exchange to refer it to the Master to see what is due for principal and interest without executing a writ of inquiry; for the quantum of damages depending on figures may as well be ascertained before the Master as a jury. *Shepherd v. Carter, 4 T. R. 275. Duproy and Johnson, 7 T. R. 473. See also 1 H. Bl. 252. 529. 541. acc.*

2. This practice, however, is confined to actions upon promissory notes and bills of exchange, and therefore where the defendant had suffered judgment by default in an action of *assumpsit* on a foreign judgment, the court refused to refer it to the Master to see what was due, and give leave to enter up final judgment, without executing a writ of inquiry; saying this was an attempt to carry the rule further than had yet been done, and as there was no instance of the kind, they would not make a precedent for it. *Messin v. Lord Massarene and Wife, 4 Term Rep. 493.*

3. The

3. The court also refused the application, in an action upon a bill of exchange, for 200*l.* Irish money, for a jury are the proper judges of the value of this money. *Maunsel v. Lord Massareene*, 5 T. R. 87.

4. Where the first count in a declaration was on a bill of exchange, to which count there was a demurrer and judgment for the plaintiff, though there was a plea to the other counts on which issue was joined, the court of king's bench referred it to the Master to see what was due on the first count. *Depersy v. Johnson*. H. 38 G. 3. 7 T. R. 473. *Vide* further, *Neilson v. Sheridan*, 8 T. R. 395. *Osborn v. Noad*, *Ibid.* 648. *Berthen v. Street*, *Ibid.* 326. *Byrom v. Johnson*, *Ibid.* 410.

5. In an action against an overseer of the poor, if there is a verdict for him and no damages assessed, a writ of inquiry shall issue. *Valentine v. Fawcett*. T. 8 G. 2. 2 Stra. 1021.

6. The want of a writ of inquiry is aided by the statute of jeofails; though it was insisted to be such a fault as cannot happen in the case of a verdict. *Mallory v. Jennings*. M. 4 G. 2. 2 Stra. 878. *Iles v. Pitt*, 2 Lord Raym. 1397. S. P.

7. After judgment by default in an action of debt on a judgment, the plaintiff may sue out a writ of inquiry. *Blackmore v. Fleming*. M. 38 G. 3. 7 Term Rep. 446.

(D. a) Inquiry of. Writ quashed or superfeded; 7 Vin. 310.  
for what, and when. And Notice; in what Cases;  
when; and how.

1. UPON executing the inquiry, the plaintiff was surprised with a defence, and not prepared to prove his whole demand; and the court set it aside on payment of costs, the damages being too small. *Hall v. Stone*. E. 8 G. 1. 1 Stra. 515. *Markham v. Middleton*, 2 *Ibid.* S. S.

2. But the court will not set it aside in an action for a tort, on the ground of smallness of damages. An action was brought for these words spoken of the plaintiff as a wine-merchant. "You are a rogue, villain, and rascal, and sell by short measure;" and the jury gave twenty shillings damages. And though it was thought a hard case, yet the court said it has always been denied to set aside a verdict for smallness of damages, and therefore denied it. *Quere tamen*, why is it not within the reason for setting aside a verdict for excessive damages. *Hayward v. Newton*, 2 Stra. 940. And *vide* *Burges v. Nightingal*, *Barnes' Notes*, 230.

3. But where the smallness of damages arises from a mistake in the law, either in the judge, or in the jury, the court will set it aside. On a contract for stock between the plaintiff and J. S., they each deposit 200*l.* in the hands of the defendant, and J. S., not performing his agreement, the plaintiff sues for the deposit, and had judgment on demurrer, and took out a writ of inquiry and proved his case; but the jury, on a notion that the defend-



## Inquiry.

ant could not pay out the money without consent of both parties, gave one penny damages; which was now set aside, the court saying, that the rule of not setting aside verdicts for the smallness of the damages did not extend to this case, where the jury mistook in point of law: and the Chief Justice said he knew no reason why the court should not interpose in the other case. *Woodford v. Eades*. 1 *Stra.* 425.

4. The plaintiff, after the interlocutory judgment and awarding the writ of inquiry, became a bankrupt, and afterwards the inquiry is executed in his name; it was moved to set this aside, on the ground that by the bankruptcy the property vested in the assignees, who should have sued out a *seire facias*, and the writ of inquiry have been executed in their names. But the court discharged the rule. *Bibbins v. Mantel*, 1 *Wils.* 358.

5. Judgment on a writ of inquiry was set aside; it appearing that the under-sheriff, who had returned the jury, was attorney for the plaintiff in the action. *Baylis v. Lucas*, 1 *Corw.* 112.

6. Where part of the jury on a writ of inquiry was composed of persons then in prison for debt, it was held a sufficient reason to set aside the execution of a writ of inquiry. *Stainton v. Beadle*, 4 *T. R.* 472.

7. The interlocutory judgment was signed in *Trinity* term 1737, and in *August* 1738 a writ of inquiry was executed upon eight days' notice; which was set aside as irregular, and held that where a term's notice of trial is required, there must at the same distance of time be the like notice of executing a writ of inquiry. *Peyton v. Burdus*, 2 *Stra.* 1100.

8. And a term's notice must be given in all cases where the proceedings have been delayed, except by *injunction* out of Chancery, for four terms. *Rule, Mich. Term, 4 Ann.*

9. On notice to execute a writ of inquiry at a certain hour, the party is not restricted to the exact time contained in the notice, for the sheriff may have prior business, which may last beyond the hour. 1 *Dougl.* 198.

10. If notice of inquiry to be executed at a particular hour and place be continued, the notice of continuance need not express any hour or place. *Jones v. Chune, one, &c.* 1b. 39 G. 3. 1 *Bos. & Pull.* 363.

11. The notice was to execute a writ of inquiry by ten o'clock, and there being no defence made, the court set it aside for uncertainty. *Jfon v. Fowen*, 2 *Stra.* 1142.

12. But notice to execute at ten, being certain, is good. *Last v. Denny, Barnes*, 302.

13. The usual way is to give notice that the inquiry will be executed between two certain hours of a particular day, on or before the return of the writ. *Arnold v. Squire, Sayer Rep.* 181.

14. There must be the same notice of executing a *seire fieri* inquiry, as a common inquiry. *Stead v. Lateward*, 1 *Stra.* 622.

15. The notice of inquiry, if the defendant have appeared and his attorney be known, should be delivered to such attorney. But if

## Inquiry.

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if the defendant have not appeared, or his attorney be unknown, the notice shall be delivered to the defendant himself, or left at his last place of abode. *Sayer Rep.* 133.

16. Where the plaintiff, upon any pleading of the defendant, tenders an issue, and the paper-book is made up and delivered, with notice of trial, and the defendant strikes out the *similiter* and returns the book with a demurrer, if judgment be given thereon for the plaintiff, the defendant's attorney shall be obliged to accept of notice of executing the writ from the time of giving the notice of trial. *R. H. 8 G. 1.*

(E. a) Writ of Inquiry. Executed. At what Time 7 Vin. 314.  
or Place, and what must be proved then.

1. **I**N an action on a policy on a foreign ship, where there is a stipulation that the policy shall be sufficient proof of interest, if there is judgment by default, the plaintiff on the writ of inquiry needs only to prove the defendant's subscription to the policy, without giving any evidence of interest. *Thelluson v. Fletcher*, 1 *Dougl.* 314.

2. If a writ of inquiry issues upon confession of the action, in trespass for taking goods, the plaintiff need not prove the property of the goods, but only the value. 2 *Dougl.* 510.

3. In an action on an agreement for goods at a sale, and judgment by default, the defendant shall not, on a writ of inquiry, be allowed to go into evidence of fraud on the sale; for by suffering judgment to go by default, he admits the agreement as set out by the plaintiff, and the writ of inquiry is only to settle the *quantum* of damages. *East India Company v. Glover*, 1 *Str.* 612.

4. Execution of a writ of inquiry may be adjourned after it is entered upon. *Coleman v. Mawbey*, 2 *Str.* 853.

5. Writ of inquiry may be executed, on due notice, before the sheriff, or his deputy. 2 *Wils.* 379. Or by leave of the court, under special circumstances, before the Chief Justice. 1 *Str.* 612.

6. But unless some matter of law is likely to arise in the course of the inquiry, the court will not give leave to have it executed before a judge merely on account of the importance of the facts. *Boddington v. Boddington*, *E.* 37 *G.* 3. But *vide* 2 *Sel.* 12.

[ G ]

## Inrolment.

14 Vin. 446.

### (G) Pleadings.

1. BY Stat. 10 Ann. c. 18. s. 3., and 8 Geo. 2. c. 6. s. 21., where an indenture of bargain and sale inrolled is pleaded with a *profert in curia*, the party may shew forth a copy of the inrolment; and such copy, examined with the inrolment and signed by the proper officer, and proved on oath to be a true copy, shall be of the same effect as the original.

2. On a proviso in a duchy lease, that it shall be inrolled with the auditor, the certificate of the auditor on the margin is sufficient evidence of the inrolment. *Kinnerley v. Thorpe*, 1 Dougl. 56.

3. If a deed be inrolled and lost, and the clerk of the assize makes out a copy of the inrolment only; this is no evidence without proving it examined; because the clerk is entrusted to authenticate the deed itself by inrolment, and not to give out copies of the inrolment of that deed. *Gilb. Law of Evid.* p. 26, *Lofft's* ed.

*Vide* tit. *Bargain and Sale*, &c.

[ D ]  
14 Vin. 447.

## Instant.

See *post*, tit. *Time*.

[ F ]

## Interest.

14 Vin. 457. (C) Interest *Money*. Allowable in what Cases, other than Legacies, Mortgages, and Portions.

1. *A.* Being indebted to *B.* in 800*l.* on a stated account, entered into articles for the payment of this debt by instalments of 50*l.* *per ann.* *A.* afterwards, by deed, created a term of years for the payment of his debts, out of the rents and profits of the

the estate, but not by sale or mortgage, only two of these instalments being paid, a bill was brought for recovering the rest: and on a question, Whether they carried interest? it was held they did. *B. P. Cases*, 7 vol. 164. 1734. *Countess Kildare v. Hopson*.

2. Though by deed 5*l.* per cent. was to be allowed, yet as it appeared that the money had been placed out on Government securities, yielding 4*l.* per cent. only, the Court reduced the interest to that rate. 3 *P. Wms.* 228. *Mich.* 1733. *Lechmere v. Earl of Carlisle*.

3. In a poor cause, to save expence, and where the matter is clear, the court has referred it to the Register, instead of a Master, to compute interest or arrears of rent. 3 *P. Wms.* 258. *Esf.* 1734. *Holder v. Chambury*.

4. Tenant for life pays one third of the interest on debts and legacies, the reversioner two thirds. 1 *Atk.* 467. *Feb.* 1736. *Partridge v. Pawlet*.

5. A debtor left a creditor by note on demand, his executor: the court will not allow him interest for it, because he may turn the money to his advantage, which is coming in from the assets, 2 *Atk.* 106. *Dec.* 1740. *Adams v. Gale*.

6. There is no certain rule as to giving interest upon arrears of an annuity; the most frequent instances are where the annuity was meant as bread for the wife or child. 2 *Atk.* 211. *July* 1741. *Drapers' Company v. Davis*.

7. Where an annuitant has entered, and is in possession of the estate charged with the annuity, the court will not oblige him to quit the possession, till the grantor allows him interest for the arrears of his annuity. 2 *Atk.* 411. *Oct.* 1742. *Sir John Robinson v. Cumming*.

8. The court had decreed an account against the defendant of the assets of her husband, as his administratrix: she took all his goods and stock in trade, and carried on the same business: the Master reported 1400*l.* due to the plaintiffs upon the balance of accounts, and the court thought she should not be charged with interest on the sum of 1400*l.*, as it was only a demand by simple contract, and she had not then sold the goods, her only fund for raising money. 2 *Atk.* 439. *Nov.* 1742. *Ryves v. Coleman*.

*And though there be no express reservation of interest in the decree, yet there is a discretionary power to allow it on special circumstances. Ibid.*

9. If an executor places out assets which are specifically devised, the court will oblige him to account for the interest he may have made of those assets; but there never was a case where the Master was directed to charge interest upon an executor, who made use of assets come to his hands in the way of his trade. 2 *Atk.* 603. *June* 1743. *Sir Caesar Child v. Gibson*.

10. Bill for the arrear of an annuity of 30*l.* secured by bond in the penalty of 500*l.*: an account was decreed of the arrears due since the year 1741, and interest at 4*l.* per cent., to be computed at the end of each half year. As this was given out of

of maintenance, and a bond to secure it, the plaintiff is clearly entitled to interest. 3 *Atk.* 579. Nov. 1747. *Newman v. Auling.*

It is not a general rule, that a purchaser of estates under a private agreement or a decree

for a sale, shall pay interest, from the time of possession; and the court, in awarding interest, never regards the execution of articles for a purchase, but the time of the execution of the conveyances; and even then the purchaser shall pay interest only from the time the possession was delivered. *Ibid.*

11. The advantage a purchaser receives from the wearing out of lives is not a reason for his paying interest for the purchase-money; but where lives drop after a purchaser is reported the best purchaser, he has been directed to make a compensation in respect of the estate being bettered. 3 *Atk.* 636. April 1748. *Blount v. Blount.*

12. A decree for the sale of an estate in mortgage. The Master's report stated a certain sum due to the mortgagee for principal and interest; the report was confirmed. The mortgage was at five *per cent.*; but as there was another mortgage and creditors besides, from the time of the report confirmed, it was to carry 4*l.* *per cent.* interest only; but this seems to have been done by consent, 3 *Atk.* 722. Feb. 1750. *Harris v. Harris.*

13. Where a contract is made in *England* for a mortgage of a plantation in the *West Indies*, no more than legal interest shall be paid on such mortgage, 3 *Atk.* 727. March 1750. *Stapleton v. Conway.* 1 *Ves.* 427. S. C.

14. Where there is a debt by covenant in marriage articles, and no mention of interest, the court will not reduce it lower than 5*l.* *per cent.* 1 *Ves.* 99. June 1748. *Swynfen v. Scawen.*

15. 1600*l.* being the balance of debts due to the partnership at the time of the bankruptcy received by *Stephens*, or *Rowles* his executor, the executor was held answerable for the interest in the same manner as on the other sums, which were part of the partnership stock; for the debts are part of the stock; and therefore there is as much reason, that when the money was got in, he should be charged with the like value as in the stock in trade. 1 *Ves.* 375. Feb. 1749-50. *Ryall v. Rowles.*

16. *Susannah Brown*, by deed-poll, deposited in the hands of the defendant 400*l.*, which was to be for the use of the plaintiff, her grandson, if he should not be sufficiently provided for during his minority by his trustees, in such manner as the defendant pleased; with a clause that the defendant, his executors or administrators, should not be chargeable with interest. The plaintiff, now of age, by his bill prayed that the defendant might account for the interest of the 400*l.*: it appeared that 200*l.*, part of the 400*l.*, was the plaintiff's own money, which had been recovered in a cause wherein the defendant had acted as solicitor for *Susannah Brown*, and in the decree there was a particular direction for placing out the estate, part of which this was, at interest for the benefit of the infant, the plaintiff. And the court ordered the defendant to pay interest upon that part of the money, which he must have known to be trust-money, viz. the sum of 200*l.* recovered as aforesaid. 1 *Ves.* 407. March 1749-50. *Brown v. Pring.*

17. Interest was allowed on the accumulated sum reported due, being a debt under a will; but, it would have been directed on the principal sum only, had it rested on the report alone. And it was said by Lord *Hardwicke* Chan., that interest by the course of the court was discretionary, and computed at 5*l.* per cent. from the 12*th* of *Ann.* on the sum turned into principal by the course of the court; but six per cent. on the principal sum due by covenant. 1 *Vesf.* 496. June 30, 1750. *Astley v. Powis.*

18. Interest, if generally decreed, is to be construed legal; but still by the nature of the fund: and if out of land, or money considered as land, is reduced to 4*l.* per cent. 2 *Vesf.* 239. 1750-1. *Denton v. Shellard.*

19. Interest decreed on banker's notes, on circumstances, though there was no evidence of an agreement for it; but, it only appearing that two daughters having money advanced them by their mother, came to the banker's shop and demanded the money, that notes were given them for the same, and interest for some time paid at 4*l.* per cent. viz. for four years. 2 *Vesf.* 265. April 30, 1751. *Jacomb v. Harwood.*

20. A trust-term created by deed for payment of debts and legacies; simple contract debts do not carry interest: so if by will, but otherwise if by deed, in the nature of a specialty. 2 *Vesf.* 363. July 1751. *Barwell v. Parker.*

21. A scrivener or attorney is bound to place out money received for that purpose, for which he gives a note, and is not discharged from interest, unless the client or employer accepts the security upon which the money is placed, and accepts the interest thereon; but if the scrivener or attorney does not place out the money, or if he does, and does not deliver over the security and declare the trust for his client, he is answerable for it himself, and for the interest too. *Ibid.*

22. Interest is not commonly reserved under general directions, unless after a trial at law. 2 *Vesf.* 470. July 1752. *Champ v. Mood.*

23. Interest computed on costs. 2 *Vesf.* 471. July 1752. *Bickham v. Cross.*

24. Lessor covenants for quiet enjoyment, and devises his real estates in trust to pay debts; the lessee is evicted, and recovers against the executors of the lessor, and assigns the judgment; this is a debt by specialty, and the assignees of the judgment are entitled to interest. But on a charge by will for payment of debts, simple contract debts do not carry interest. 2 *Vesf.* 587. Oct. 1751. *Earl of Bath v. Earl of Bradford.*

25. In this case, it was said by Lord *Hardwicke* Chan. that the rule of the court for allowing interest for arrears of a jointure is not general; but the court will expect a special case to be made for it, as the being obliged to borrow money at interest. 2 *Vesf.* 662. July 1755. *Anon.*

26. Interest on a mortgage is not stopped, but on a proper and strict tender, and notice, and not upon proposals to deduct upon

## Interest.

upon an open account on the other side: *Garforth v. Bradley*, 2 *Ves.* 678. *Oct.* 1755. 2 *Ves.* 372. S. P.

27. Interest was ordered on further directions, though it was not reserved by the decree. *Amb.* 584. *Oct.* 1738: *Goodyere v. Lake*.

28. Money raised by deed upon land, and invested in the name of a trustee, to pay debts, the residue to the use of the trustee; the simple contract debts are not changed in their nature, and shall not bear interest: but if the creditors had filed bills, and obtained separate reports, from that time their debts would have carried interest. 1 *Bro. Ch. Rep.* 41. *East.* 1779. *Shirley v. Earl Ferrers*.

29. In a long unsettled partnership account, rendered intricate by the neglect of a party, he shall have no interest on the balance, when settled. 1 *Bro. Ch. Rep.* 239. 1783. and 2 *Bro. Ch. Rep.* 2. S. C. *Boddam v. Riley*.

30. Where an executor or administrator keeps testator's or intestate's money in his hands a long time unemployed, or makes interest of it, he shall answer it: 1 *Bro. Ch. Rep.* 359. 1784. *Newton v. Bennett*.

31. A receiver of a public trust, having a salary, making interest of balances in his hands, is accountable to the trustees for interest made *ultra* his salary. 3 *Bro. Ch. Rep.* 41: *Dec.* 1789. *Earl of Lonsdale v. Church*.

32. An agent of an administrator keeping money of the intestate's in his hands, which he had proposed to his principal to lay out in the funds, ordered to pay interest. 3 *Bro. Ch. Rep.* 107. *July* 1790. *Browne v. Southern*.

33. There being a surplus of a bankrupt's estate, interest was allowed to creditors, where, by the course of trading, and settled accounts, interest was allowed after a certain credit: 3 *Bro. Ch. Rep.* 436. *Hil.* 1792. *Ex parte Champion*. See also 1 *Ves. jun.* 170. *Ex parte Goring*.

34. Assignees of a bankrupt kept the fund eight years without dividing; one admitted that he had lent the share received by him at 5*l.* per cent.; the other, that he had lent the share which he had received to a partnership, in which he was engaged, with his own money, without any distinct charge of interest: he was decreed to pay such interest as he had made, and where he had made none, 4 per cent. 3 *Bro. Ch. Rep.* 457. *Hil.* 1792. *Hankey v. Garret*, 1 *Ves. jun.* 236. S. C. *Treves v. Townshend*, 1 *Bro.* 384. S. P.

35. The court refused to give interest on the arrears of an annuity secured by bond in bar of dower. 3 *Bro. Ch. Rep.* 495. *March* 1792. *Tew v. the Earl of Winterton*.

36. In this case it was said by Lord Loughborough Chan., that at law interest was given for every debt detained, either by contract or in damages, and decreed interest upon a simple contract debt. 1 *Ves. jun.* 63. *Dec.* 1789. *Craven v. Tickell*. See vide 1 *Atk.* 151. *Ex parte Marlar*; and 2 *Ves.* 589. *Earl of Bath v. Earl of Bradford*.

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37. Interest at 4l. per cent. against assignees of a bankrupt for not making a dividend, when they ought to have done, decreed; and it was said that 5l. per cent. would be ordered, if the assignees had made more by it. 1 Ves. jun. 89. Feb. 1790. *Ex parte Hilliard.*

38. A brother of a lunatic, who was committee of the estate, and had managed it nine years before the commission, during which time there were considerable savings; was ordered to pay interest, though alleged he made no use of it, unless there were particular circumstances to justify his not doing so. 1 Ves. jun. 156. June 1790. *Ex parte Chumley.*

39. Interest was refused where it was not prayed by the bill. 1 Ves. jun. 156. 1792. *Weymouth v. Bowyer.*

40. Where interest was not reserved by the decree, the court thought it could not be given on petition, the object of which was merely to carry the decree into execution. But on further directions the court may give interest, though it was not reserved by the decree. 2 Ves. jun. 157. June 1793. *Greuze v. Hunter*, 4 Bro. Ch. Rep. 316. S. C.

41. In case of a surplus coming to a bankrupt, creditors have a right to interest, wherever there is a contract for it appearing either on the face of the security or by evidence. 2 Ves. jun. 295. Dec. 1793. *Ex parte Mills.*

42. The reason of the rule in Chancery to give interest at 4l. per cent. only, is, that money is generally to be had at that rate; but the rule is not invariable. 2 Ves. jun. 511. Dec. 1794. *Lewis v. Freke.*

43. Upon a bill by executors to have the assets administered, no interest is to be allowed upon a judgment on assets *quando acciderint*. 2 Ves. jun. 716. Aug. 1795. *Deschamps v. Vanneck.*

44. Interest allowed upon a written agreement to pay by instalments. 3 Ves. jun. 133. May 1796. *Parker v. Hutchinson.*

45. In this case it was said by Sir Richard P. Arden, Master of the Rolls, that interest was given at law upon a written undertaking to pay, or on notes payable on a day certain; not upon notes payable on a day uncertain, shop debts, &c. *Ibid.*

46. Where a fund was to be laid out in land and settled, and the trustee kept it at his banker's *unproductive*, he was directed to pay interest after the rate of 4l. per cent. 4 Ves. jun. 101. July 1798. *Young v. Combe.*

47. Where a mortgage upon a bankrupt's estate was deficient, and the mortgagee proved the remainder of his debt under the commission, he was not allowed to charge interest beyond the date of the commission. 4 Ves. jun. 165. Aug. 1798. *Ex parte Badger.*

48. Interest was given at 4l. 10s. per cent. 4 Ves. jun. 631. May 1799. *Cox v. Chamberlain.* See 2 Ves. jun. 411, 412.

49. Separate creditors having received 20s. in the pound, are not entitled to interest out of the surplus of the separate estate, until the joint-creditors have been paid 20s. in the pound. 4 Ves. jun. 677. June 1799. *Ex parte Clarke.*

50. A cus-



50. A custom in *Liverpool* for the banker to strike a balance every quarter, and send the account to the merchant, and then to make that balance a principal to carry interest to the next quarter, is not usury. 2 *Anstr.* 495. Nov. 35 G. 3. *Calist v. Walker.*

51. Money disbursed by the mortgagee shall carry the same interest as the original sum. 2 *Anstr.* 551. *East.* 35 Geo. 3. *Woolley v. Drag.*

52. A judgment debt carries interest. 2 *Anstr.* 558. 16 May, 35 G. 3. *Thomas v. Edwards.* 3 *Anstr.* 804. S. C.

53. A purchaser of a future interest after a term, shall not pay interest, or an increased price for a part of the term elapsing before the purchase is completed, unless the delay be by his fault. 3 *Anstr.* 877. Hil. 27 G. 3. *Growcock v. Smith.*

14 Vin 450. (D) In Cases where Interest shall be allowed, *from what Time* the Allowance shall be.

1. **I** NTEREST not allowed on simple contract debts, but from the time of the Master's report confirmed; but there is no general rule that on a trust to pay debts simple contract debts shall carry interest. 2 *Atk.* 111. Jan. 1740. *Lloyd v. Williams.*

2. Where the land does not yield annual profits, all debts will not carry interest out of a trust for payment of debts. *Ibid.*

3. Lord *Hardwicke* Chan. said, in this case, that an administrator was not in all cases chargeable with interest on account of the personal estate in his hands. 2 *Atk.* 151. March 1740. *Wilkins et Ux. v. Hunt.*

4. The court gave interest from the time the Master's report was confirmed, which was 28 years, on the arrears of an annuity, in favour of the representative of an annuitant. 2 *Atk.* 212. July 1741. *Drapers' Company v. Davis.* And Lord *Hardwicke* Chan. said, that interest was often decreed from the time the debt was liquidated, though the debt in its own nature did not carry interest. *Ibid.*

5. Interest from the time the principal became a duty decreed, at 4 per cent. 2 *Ves.* 487. July 1752. *Earl of Pomfret v. Lord Windsor.*

6. Interest ordered to be computed, and paid on sums reported due, from the date of the report. 4 *Bro. Ch. Rep.* 157. Dec. 1792. *Creuze v. Lowth.* Vide 2 *Ves. jun.* 157. S. P. *Bunb.* 566.

7. Interest not given from the confirmation of the report upon demands liquidated by it, but not bearing interest in their nature, as legacies and arrears of annuities, though both legacies and annuities were charged upon land, and the annuities were not paid out of the rents and profits, because possession was taken by mortgagees, and though one of the annuities was the provision for a widow. 2 *Ves. jun.* 157. June 1793. *Creuze v. Hunter.* 4 *Bro. Ch. Rep.* 316. S. C.

8. In the case of a mortgage the whole sum liquidated by the report carries interest. *Ibid.* 159.

9. Interest is computed by the Master's report upon such debts only as carry interest according to the rate they carry, and upon further directions subsequent interest is directed only on those upon which the report has already computed interest: but no interest is computed on simple contract debts by the report or by order afterwards. 2 *Ves. jun.* 165 S. C.

10. The court may give interest on further directions: and where a trustee had disobeyed an order to pay money into court, he was charged with interest on the sum from the date of the order. But a slight difference between the sums admitted, and those reported to be in his hands not sufficient to impute to him wilful misconduct, or to ground a direction for an inquiry what interest he made of the money, or to subject him to costs. 2 *Ves. jun.* 37. Dec. 1792. *Saumes v. Rickman.*

11. Bond and judgment assigned, interest must be calculated to the date of the report, so as not to exceed the penalty. 3 *Ves. jun.* 555. Nov. 1797. *Shurpe v. Earl of Scarborough.*

(E) *Upon Interest*, and in what Cases it shall exceed 14<sup>th</sup> in. 462.  
the Penalty.

1. **W**HERE a creditor by judgment extends lands by *elegit*, he holds *quousque debitum satisfactum fuerit*, and at law the debtor cannot on a writ *ad computandum* insist on the creditors doing more than account for the extended value; but if the debtor comes here for relief, the court will give it him, by obliging the creditor to account for the whole he has received; but as he who comes for equity must do equity, will direct the debtor to pay interest to the creditor, though it should exceed the principal. A creditor is not confined to the extent of the penalty upon a judgment, but may carry the computation of interest beyond it. 3 *Atk.* 517. March 1747. *Godfrey v. Watson.*

2. Compound interest at 4l. per cent. allowed the tenant for life, for the remainder-man's proportion of fines paid for the renewal of a beneficial lease. 1 *Bro. Ch. Rep.* 440. 1785. *Nightingale v. Larvson.*

3. Subsequent interest on a mortgage calculated on the principal and interest reported due; on bonds and legacies, on the principal only. 1 *Bro. Ch. Rep.* 571. May 1784. *Perkins v. Boynton.*

4. Interest upon interest refused upon the practice of the court, though the Chancellor said he saw no reason why, if a man does not pay interest; when he ought, he should not pay interest for that also. 1 *Ves. jun.* 99. March 1790. *Waring v. Cunliffe.*

5. Arbitrators may allow compound interest due by contract, either express or implied, from the nature of the transactions; and whether it be due or not, is a conclusion of fact, in which their judgment is final; but the court desired to be understood not to

## Interest.

lay down any rule in regard to interest on mortgages. 2 *Ves. jun.* 15. Nov. 1792. *Morgan v. Mather.*

6. Interest computed on bonds only up to the penalty. 2 *Ves. jun.* 157. June 1793. *Creuze v. Hunter.* 4 *Bro. Ch. Rep.* 316. S. C.—See *Bunb.* 23. *Elliott v. Davis*, contra.

7. A mortgagee had also a bond, on which the interest due exceeded the penalty. The mortgagor conveyed the equity of redemption in trust for his creditors, paying this bond first. Nothing beyond the penalty can be claimed. 2 *Anstr.* 525. 24 Feb. 35 G. 3. *Lloyd v. Hatchett.*

8. Devise for payment of debts revives simple contract debts, even of 70 years standing, with full interest; but bond creditors can claim nothing beyond the penalty. 2 *Anstr.* 527. *Ketilby v. Ketilby*, cited.

34 Vin. 460. (F) *How much*, where the Debt was contracted in a foreign Country.

1. **W**HERE the debt was contracted in *England*, but the bond taken for it in *Ireland*, to be paid at a certain time, and at 7l. per cent., it shall carry *Irish* interest. 2 *Atk.* 382. July 1742. *Connor v. Earl of Bellamont.*

2. Where a contract was made in *England* for a mortgage of a plantation in the *West Indies*, no more than legal interest shall be paid. And if in such case there is a covenant in the mortgage deed for payment of 8l. per cent. interest, it would be within the stat. of usury, notwithstanding this is the rate of interest where the land lies. 3 *Atk.* 727. May 1750.—*Stapleton v. Conway*, 1 *Ves.* 427. S. C.

[ F ]

## Interrogatories.

34 Vin. 461.

(A) What they are; and exhibited by whom.

1. **A**N adverse party may cross-examine a witness to the same point for which he is produced, but not to any new matter. 2 *Atk.* 44. July 1740. *Dean and Chapter of Ely v. Sir Simeon Stewart.*

2. A commission was prayed for examining witnesses in the *West Indies*, where the facts arose, and to stay the defendant's proceeding at law on a policy. Commission and injunction granted, the voyage being at and from *Carthagera* to *Porto Bello*, the facts must necessarily have arisen in the *West Indies*. 2 *Atk.* 259. July 1742. *Chitty v. Selwin.*

3. Though

3. Though at law you can examine only to general credit, yet it is otherwise in equity; for as the witness there cannot be prepared to defend every particular action of his life, not knowing to what they may intend to examine him; yet on an examination here he may be able to answer any particular charge, as he has time enough to recollect. 3 Atk. 522. June 1747. Gill v. Watson.

*Quere*, whether there be any such distinction between the examinations here and at law, with regard to examinations to the credit of witnesses.

4. Plaintiff may serve any two of defendant's commissioners with notice of the execution of the commission, and is not tied down to such only as the defendant should choose. 3 Atk. 633. April 1747. *Anon.*

5. The court will not allow articles to be exhibited against the competency of a witness after publication, because this might have been objected to and inquired into upon the examination. 3 Atk. 643. April 1748. Callaghan v. Rochfort.

6. But the court allows such articles to the credit of a witness after publication, because the matters examined into in such cases were not material to the merits of the cause; though not when the commission is to go to foreign parts, on account of the delay, unless no person in England can swear to the credit. *Ibid.*

7. Depositions *de bene esse*, published where there can be no examination in chief, as where the council in Sweden refused to let the commission for the examination in chief be executed there. 2 Ves. 325. July 1751. Gason v. Wordsworth.—2 Ves. 336. S. C.; and Amb. 108. S. C.

8. Depositions *de bene esse* where the witnesses are dead, and no opportunity to examine in chief, though after great length of time, published; but without prejudice to exception at the hearing. 2 Ves. 497. July 1754. *Anon.*

9. Plaintiff, on his examination on interrogatories, charged and discharged himself in the same sentence, sufficient; but had they been in different sentences, he must have proved the discharge. Amb. 589. Oct. 1748. Kirkpatrick v. Love.

10. Interrogatories are exhibited of course to falsify an examination *pro interesse suo*. 2 Bro. Ch. Ca. 15. Mich. 1785. Rowley v. Ridley.

11. Where a person is the only witness to a material fact, he may be examined *de bene esse*. 2 Bro. Ch. Ca. 611. July 1789. Hankin v. Middleditch.—See also Lord Cholmondeley v. Earl of Oxford, 4 Bro. Ch. Ca. 157. Dec. 1792. S. P.

12. The examination of witnesses, who are foreigners, must be in English, and the interrogatories and their answers translated by sworn interpreters. 4 Bro. Ch. Ca. 90. July 1792. Lord Belmore v. Anderson.

13. A married woman, being in America, being entitled to a legacy, a commission for her examination would have been directed, but as she had been examined under a commission issued by the

## Interrogatories.

*American Government*, it was considered sufficient. 3 *Ves. jun.* 321. Feb. 1797. *Campbell v. French*.

14. Motion on behalf of one of the creditors who had proved (before the deputy remembrancer) his demand upon the estate in the cause, for leave to exhibit interrogatories to the plaintiff, to discover the demands due from him to the estate, refused, because each creditor might claim the same privilege. *Anstr.* 361. 9 Dec. 1793. *Bowen v. Webb*.

15. In a suit to obtain testimony for defence of a suit at law, the court will not grant a commission to examine witnesses abroad, unless on good grounds shewn, although no injunction be moved for. *Anstr.* 880. Hil. 37 Geo. 3. *Shedden v. Baring*.

(D) Examined on *new* Interrogatories. In what Cases.

1. NOTICE must be given of a motion to add new interrogatories for the examination of a defendant, on the examinations before put in being reported insufficient; and an order for that purpose obtained upon a motion of course will be discharged. 3 *Atk.* 511. May 1747. *Anon.*

2. After the depositions under a former commission had been seen, the court would not suffer additional interrogatories to be exhibited under a new commission, but confined the defendant to proving exhibits, and cross-examining a person already examined for the plaintiffs; but not to examine any new witnesses. 3 *Atk.* 593 Dec. 1747. *Barnsly v. Powell*.

3. On contradictory affidavits of the same person, a personal examination is required. 2 *Ves.* 26. Ofr. 1760. *Ex parte Lord*.

4. Interrogatories and depositions being suppressed, leave was given to exhibit new interrogatories for the examination of the same witnesses. *Amb.* 585. March 1739. *Lord Arundel v. Pitt*.

5. Witnesses re-examined, where there was a mistake, and that mistake apparent. 3 *Bro. Ch. Ca.* 370. Mich. 1791. *Sandford v. Paul*.—1 *Ves. jun.* 398. S. C.

6. Motion for leave to examine a witness before the examiner, after publication, who had been sworn before publication passed, and all the interrogatories then given in. And this appeared to have been the practice, but the court disapproved of it, though, as the present party has been deceived by it, he was suffered to examine his witness. 3 *Anstr.* 835. 17 Dec. 37 G. 3. *Jenkinson v. Sir Lucas Pepys, Bart.*

7. An interrogatory, which went to the very gist of the cause, being suppressed as leading, the court gave leave to exhibit a fresh interrogatory. 3 *Anstr.* 923. 29 May, 37 G. 3. *Mentill v. Payne and others*.

(G) Punishment for *Refusal* to be *examined* thereon. 14 Vin. 464.

UPON motion that Mr. *Manley* (a witness) be committed for a contempt of court, in not submitting to be examined before the Master, it was decided by the Chancellor, assisted by the Master of the Rolls, that, after a decree, the Master may examine witnesses; but ought not to do so by his clerk; the same subpoena issues as to bring them before the examiner; which is the same as a *subpoena* to answer: but the *label* expresses the purpose; upon an examination in the country, *the body of* the writ expresses, that it is to testify. And it was said that the decrees in the Exchequer express, that the Master is armed with a commission to examine witnesses, and power to direct the same to the country; and that it was so formerly in Chancery. After a decree, if the Master sees cause for a commission to examine witnesses in the country, he certifies that it is necessary; and the depositions, when returned, are filed by the Six Clerk; but depositions taken before the Master are kept in their offices. 3 *Ves. jun.* 603. *Dec.* 1797. *Parkinson v. Ingram.*

*Vide Commission, Deposition, Examination, Hearing, &c.*

Inventory.

[D]

(B) Necessary; in what Cases; and the Punishment 14 Vin. 464. of not making it.

1. EXECUTORS made no inventory, but paid interest for a legacy during their lives. Decreed, by *Hardwicke L. C.*, that this is evidence of assets; and, he said, nothing is more necessary than to keep executors to deliver inventories. *Corporation of Clergymen's Sons v. Swainson*, 1 *Ves.* 75.

2. When the executor paid several legacies in full, and died, not having made an inventory, it was decreed by Sir *J. Strange* Master of the Rolls, that his representatives having assets of the said executor, shall pay the rest. Not exhibiting an inventory, which every person ought to do, especially in a deficient estate, is an imputation upon him, and inclines the court to bear harder upon him, because he may at any time relieve himself by an inventory if he finds the estate deficient. *Orr v. Kaines*, 2 *Ves.* 193.

24 Vin. 466.

## (C) Of what Things, and how.

1. **A** Fire engine set up for the benefit of a colliery by a tenant for life, is to be considered as personal estate, and goes to his executor; for it is an accessory to carrying on the trade of getting and vending coals, and is a matter of a personal nature. *Lawton v. Lawton*, 3 Atk. 13. *Lord Dudley v. Lord Ward*, Amb. 113.—*Bull. L. N. P.* 34. S. C.

2. But salt pans go to the heir, and not to the executor; for they are not accessories to carrying on a trade, but means of enjoying the inheritance. *Lawton v. Salmon*, 1 H. Black. 259.

3. With regard to things otherwise personal, which have been affixed to the freehold, the rule as to whom they shall go obtains with most rigour in favour of the inheritance, and against the right to disannex therefrom. *Per Lord Ellenborough C. J. Elves v. Maw*, 3 East, 51.

3. In deciding, whether a particular fixed instrument, machine, or building, shall be considered as removable by the executor, as between him and the heir, the main ground is, that where such instrument, engine, or utensil (and the building covering the same falls within the same principle) is an accessory to a matter of a personal nature, it shall itself be considered as personalty. *Cod. Jud. Ib.* 53.

24 Vin. 466.

## (D) Considered how; and the Effect thereof when exhibited.

1. **T**HE executor is admitted both at law on plea of *plene administravit*, and in equity on account of assets, to shew that the money for which, by solemn inventory on oath, he has charged himself, has by accident, as, perhaps, failure of some great merchant, not come to his hands, so that the inventory is not finally binding. *Per Sir J. Strange, M. R. In Orr v. Kaines*, 2 Vesf. 193.

See 2 Fonb.  
418. n.

2. The spiritual court has no jurisdiction to falsify, at the suit of a creditor, an inventory exhibited by the executor. *Cotchford v. Ovington*, 3 Burr. 1922. *Bewick v. Ord*, *ib. n.*

## Intire Damages.

[ G ]

1. IN trespass and false imprisonment, the plaintiff declared that the defendant imprisoned him the 1st October, 9 W. 3., and detained him in prison for four months, and after verdict for the plaintiff and intire damages, judgment was arrested, because the declaration being of Michaelmas term 9 W. 3., and the damages being intire, and given for the imprisonment of four months from the 1st October, it appeared that the damages were given for imprisonment after the action was commenced. *Briggsfield v. Let*, 1 Ld. Raym. 329.

2. A judgment in the Common Pleas was reversed in the King's Bench, because the jury on the writ of inquiry had given damages for necessities provided after the action commenced, and to a time after the writ of inquiry was executed. *Baker v. Buché*, 2 Ld. Raym. 1382.

3. It is a settled rule, that where there are several counts, and a verdict is entered generally on all the counts, and intire damages are given, and one count is bad, it is fatal, and judgment shall be arrested. *Grant v. Aftle*, 2 Dougl. 730.

4. And it shall be arrested *in toto*, and no *venire de novo* awarded. *Trevor v. Wall*, 1 T. R. 151. *Hancock v. Hayward*, 3 T. R. 435. *per Buller J.* *Holt v. Scholesfield*, 6 T. R. 691.

5. But, where a general verdict has been taken, and evidence been given only on the good counts, the court has permitted the verdict to be amended by the judge's notes. *Eddowes v. Hopkins*, 2 Dougl. 376.

6. So, where it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good only, the court will amend the verdict by entering it on those counts, though evidence was given applicable to the bad count also. *Williams v. Breedon*, 1 Bos. & Pull. 329. *Spencer v. Goler*, 1 H. Bl. 78.

7. In *Webb v. Turner*, the declaration was of Michaelmas term of an assault on the 18th of October, and an imprisonment from thence for 25 weeks, and after a verdict for the plaintiff, it was moved in arrest of judgment that the action was brought too soon, and it appeared damages had been given for an imprisonment long after the action was depending; and 2 Salk. 662. 2 Saund. 169. Cro. Jac. 618. 1 Vent. 103. Hob. 189. Carth. 386. were cited in support of the objection. But for the plaintiff it was argued that the *continuando* in this case was laid under a *scilicet*, and therefore, according to *All. 22.* and *Hob. 171. 284.*, it will not vitiate what is properly laid in time, and that this differs from all the cases where the time is affirmatively laid. And of this



opinion was the court, and the plaintiff had judgment. *Webb v. Turner*, 2 *Stra.* 1095. *And.* 250. S. C.—See also 3 *Lev.* 346. *Carth.* 251. 4 *Mod.* 152. These cases seem to establish this principle, that where it is positively and expressly averred in the declaration that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury give intire damages, judgment will be arrested; but where the cause of action is properly laid, and the other matter either comes under a *scilicet* or is void, insensible or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment. Vide *Hambleton v. Were*, 2 *Saund.* 171. s. (note 1.), *Williams's* edit.

8. A distinction has been taken; that where a new action may be brought, and satisfaction obtained, for any duty or demand which hath arisen since the commencement of the depending suit, that duty or demand shall not be included in the judgment in the former action; as in covenant for non-payment of rent, or of an annuity payable at different times, the plaintiff may bring a new action *toties quoties*, as often as the respective sums become due and payable. So in trespass, and in tort, new actions may be brought as often as new wrongs and injuries are repeated; and therefore shall be assigned only up to the time of the wrong complained of. But where a man brings an action of *assumpsit* for principal and interest, upon a contract obliging the defendant to pay such principal money, *with interest* from such a time, he complains of the non-payment of both, the interest is an accessory to the principal, and he cannot bring a new action for any interest grown due between the commencement of his action and the judgment in it, and therefore both shall be included in the judgment. *Robinson v. Bland*, 2 *Burr.* 1087.

## [B] Joint-Tenants [and Tenants in Common].

14 Vin. 470. (A) On the Effect of a Disposition to two, and the Survivor of them, and the Heirs of such Survivor.

See Suppl. tit. *Abeyance*, ante.

(B) Of what Estates, Things, or Actions there may 14 Vin. 471.  
be a Survivor.

1. EXECUTORS taking a residue as executors are joint-tenants,  
and therefore if one die before severance his share survives.

2 Bro. Ch. Rep. 220. July 1787. *Frewen v. Relfe*.

2. Mr. Hargrave, in note 2. Co. Litt. 113. a., entertains the opinion, which he supports by a train of argument and authorities, that a power to sell, though in itself a mere naked authority, yet, when given to executors, *eo nomine*, will go to the survivor, by reason that it is annexed to their office and character, which itself survives.

(E) What shall be said a Severance of the Jointure. 14 Vin. 476.

1. A. B., previously to her marriage, was entitled to 5300*l.* in joint-tenancy with her sister C. D. By her marriage-settlement her real estate only was conveyed; and, with respect to the personal estate, the deed contained merely a recital, which amounted to nothing more than that she should enjoy the 5300*l.* for her separate use; and a covenant on the part of her husband, that she should enjoy it quietly. Then came these words; "for want of issue of her own body, it shall go to the next of kin of her own family." The question was, whether this amounted to a severance of the joint-tenancy, in the whole, or in part? Lord Hardwicke held it did not; for, *first*, here was no agreement for this purpose; *secondly*, if no agreement, there must be an actual alienation, and here was nothing which amounted to it, either at law or in equity; as to the words "for want of issue of her body," that it shall go over, had these been sufficient to make the issue purchasers, or to give them a right to come into that court, to have the agreement carried into execution in their favour, that he should have inclined to think a severance; but, in the case before him, notwithstanding these words, he thought the property still at large, and at the wife's disposal. *Partridge v. Powlett*, 2 Atk. 54. See *Moyse v. Giles*, stated in 14 Vin. 525. pl. 9.

2. If articles amount to a severance of the joint-tenancy, equity will decree performance against the survivor. *Hinton v. Hinton*, 2 Ves. 234.

3. Three sisters being joint-tenants of the premises, and having a leasehold estate vested in them absolutely, by articles previous to the marriage of one of them, it was covenanted that her interest in the leasehold should be assigned absolutely to the husband, and her third part of the freehold settled to the use of the husband for life, remainder to trustees to preserve contingent remainders, remainder to the wife for life, remainder to the first  
and

## Joint-Tenants and Tenants in Common.

and other sons, &c.; and the husband covenanted, if the wife should survive him, or have children who should survive him, to pay to the trustees 300*l.*; a sum very inadequate to her fortune; to pay the interest to the wife for life, and after her decease to divide the principal among the children. The wife had a son, who died an infant: it was held that this covenant had not severed the joint-tenancy. 1 *Bro. Ch. Rep.* 112. *in notis.* 1773. *May v. Hook.*

4. Covenant by joint-tenant to sell severs the joint-tenancy in equity, though not at law. 3 *Ves. jun.* 257. Nov. 1796. *Brown v. Raindle.*

### 24 Vin. 484. (K) Joint-Tenants, or Tenants in Common, by what Words, (*by Devise*).

1. ONE devises the surplus of his personal estate to his four executors; this is a joint bequest, and on the death of one shall go to the survivors, as well in the case of a legacy as a grant. 3 *P. Wms.* 115. *Trin.* 1731. *Willing v. Baine.*

2. Testatrix devises two houses to J. P. and J. H. generally, and then says, “*my meaning is, that the rents of my two houses should be EQUALLY SHARED between the said J. P. and J. H.*” the devisees shall take as tenants in common, and not as joint-tenants: and J. H. having, on the death of J. P., taken possession of the two houses, as survivor, and enjoyed them ever since, must account for the rents as far back as the death of J. P., and not from the filing of the bill. 1 *Atk.* 493. *Hil.* 1737. *Prince v. Heylin.*

3. Joint-tenancy is not favoured in equity, and the word *respectively* will separate an estate, and make it a tenancy in common. 2 *Atk.* 122. *Feb.* 1740. *Heathe v. Heathe.*

4. G. E., seized of a gavelkind estate by deed-poll, in consideration of natural love and affection to his wife and children, did grant to his two daughters, Margaret and Hannah, the rents of his lands in L., *equally* to be divided between them, paying 5*l.* to the mother during her life, and after her decease to his two daughters to hold to them and their heirs, *equally* to be divided between them: this is a tenancy in common. 3 *Atk.* 731. *March* 1751. *Rigden v. Vallier.*—2 *Ves.* 252. S. C.

5. Devise of residue of real and personal estate to two persons, the testatrix, by a codicil, revokes *every* legacy given to one of them: held the other took the whole. *Amb.* 136. *Feb.* 1752. *Humphrey v. Tayleur.*

6. Devise of profits of land in trust for his six younger children, to be distributed amongst them in *joint* and *equal* proportions. Held a tenancy in common, at the Rolls. *Amb.* 656. *Dec.* 1767. *Ettricke v. Ettricke.*

7. Though the words *share* and *share alike*, in a will, generally create a tenancy in common, they cannot do so, where there is an express

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express joint tenancy. 3 Bro. Ch. Rep. 215. Hil. 1791. *Armstrong v. Eldridge*.

8. Gift of a share over to the children of the testator's cousins, *share and share alike*, at their ages of 21, is a tenancy in common; and one dying in the lifetime of testator, her share lapses. 3 Bro. Ch. Rep. 324. Aug. 1791. *Martin v. Wilson*.

9. A legacy given to two or more persons, without words of severance, makes a joint-tenancy; therefore, where in a will as to a residue two thirds were given *to and amongst* the children of *A. and B.*, they took as tenants in common; but the remaining third being given to the children of *C.*, they took as joint-tenants. 4 Bro. Ch. Rep. 15. July 1792. *Campbell v. Campbell*.—See also *Morley v. Bird*, 3 Ves. jun. 628. S. P. and *Stewart v. Bruce*, 3 Ves. jun. 632. S. P.

See Suppl. tit. *Devise* (E. d), *ante*.

### (L) In what Cases they shall be Joint-tenants or Tenants in Common. [By Deed, &c.] 14 Vin. 487.

1. *A. B.* executed a deed, whereby, in consideration of natural love and affection, and for settling his real and personal estate on his wife and children after his decease, he gave, granted, and confirmed to his two daughters *C. and D.* (*int. al.*) the rents and profits of certain lands during the life of his wife, equally to be divided between them, paying *5l. per annum* to his wife; and after her decease, his said two daughters to have the same lands to them and their heirs for ever, *equally to be divided between them*. Lord Hardwicke, after declaring his opinion, that the instrument operated as a covenant to stand seised, held that the daughters took by it *as tenants in common*; and his lordship, after adverting to a position which had been advanced, and combated, in the course of the argument, that deeds to uses were to be construed with less strictness than common law conveyances, observed, that although they must be construed alike as to words of LIMITATION, yet he saw no harm in construing the former with greater latitude, as to words of *regulation or modification* of the estate, as the words "*equally to be divided*" were. *Rigden v. Vallier*, 2 Ves. 251—7. 3 Atk. 371. S. C.—See *Marryat v. Townley*, stated in Suppl. tit. *Devise* (E. d), *ante*.

2. *A. B.*, by lease and release, conveyed lands to trustees, to the use of himself and his wife, for their lives, remainder to their children, as *A. B.* should appoint; and in default, &c. to the use of all and every the children of *A. B.* and their heirs, *equally to be divided between them*. *A. B.* died, leaving children, and without making any appointment. The court of *B. R.* were of opinion, upon the authorities of *Fisher v. Wigg*, and the *anon.* case in *Ventr.* (both stated in *pl. 33.* of the section to which this is a supplement), that the words "*equally to be divided*," in a deed of uses,

as

## Joint-Tenants and Tenants in Common.

as in the present case, created a tenancy in common. *Goodtitle v. Stokes*, 1 *Wils.* 341. See *Cox's* note 1 *P. Wms.* 14.

3. By deeds of lease and release, lands were conveyed to trustees, in trust, after the marriage of the releasor, to permit him to take the profits for 99 years, if he should so long live; and after his decease, in trust to permit his intended wife to take the profits for her life for her jointure; and after the decease of the survivor, in trust to permit the children to take the profits to them and their heirs, in such shares, &c. as the settlor should appoint; and for want, &c. in trust to permit all and every such child and children to take the profits, &c. to them and their heirs for ever; but, in case there should be no such child, or in case such child or children should be all dead without child or children of their bodies living at the decease of the survivor of the husband and wife, then the trust for the heirs and assigns of the settlor. There were several children of the marriage, and the husband died without making any appointment. It was decreed by Lord Ch. *Thurlow*, in 1783, that the children took by the limitation as joint-tenants. From this decree a petition of appeal was preferred in 1787; and, on behalf of the appellant, it was argued, that the ultimate disposition to the settlor was inconsistent with the idea of a joint-tenancy, since the heirs of the settlor were not to take till all the children were dead without issue; and therefore the children of a child who should die in the lifetime of the settlor or his wife, should be let in to take; in order to effectuate which purpose, the children must take as tenants in common, since otherwise the survivors would take in exclusion of such issue. And the word "every" in the limitation was strongly relied upon, as implying severalty. The object of the conveyance was also urged; and the before-stated distinction between conveyances at common law, and to uses adverted to. But Lord *Thurlow* continued of his former opinion; and did not seem inclined to favour the latitude of construction which was contended for in conveyances to uses. *Stratton v. Best*, 2 *Bro. Cha. Ca.* 233.

4. Settlement of leasehold estates, by articles previous to marriage, upon the settlor for life, and after his decease to "the children of" the settlor, to be begotten on the body of his intended wife. The children were held to take as joint-tenants. *Stapleton v. Maurice*, (B) 7 *Bro. Parl. Ca.* 49.

See *Devise* (F: 2), ante.

14 Vin. 484.

(I) In what Cases, and to what Purposes the Inheritance shall be said to be *executed* in the Life of the Parties.

"WHERE land is given to two, and the heirs of one of them, he in the remainder cannot grant away his fee simple." *Co. Litt.* 184. b.

Mr.

## Joint-Tenants and Tenants in Common.

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Mr. Hargrave, to this passage, has subjoined the following note :

" There is a seeming difficulty in this passage. But I conceive Lord Coke's meaning to be, that though, for some purposes, the estate for life of the joint-tenant having the fee is distinct from and unmerged in his greater estate, yet for granting it is not so, but both estates are in that respect consolidated, notwithstanding the estate of the other joint-tenant; and, therefore, that the fee cannot, in strictness of law, be granted as a remainder *eo nomine*, and as an interest distinct from the estate for life. This explanation is confirmed by a note in *Coke upon Littleton* I have, in which it is strongly observed, that " the two estates, *viz.* for life and in fee, or rather one knotted estate, are so confounded together " in one person, that he cannot sever them and make them distinct estates, for he cannot grant the estate for life, reserving, " to himself the fee simple, nor can he grant the fee simple and " reserve the estate for life; but he may pass away all his interest by feoffment, or he may forfeit all." See *Bro. Nouv. Cas. pl. 115*. It also much agrees with the language of Lord Coke's report of *Wiscot's case*, especially where he observes, that when an estate is made to three and the heirs of one, *he, who hath the fee*, cannot grant over his remainder, and continue in himself an estate for life, for which Lord Coke cites 12 E. 4. 2. b. See 3 Co. 61. a. Besides, if the passage here should be understood to signify that the joint-tenant, having the fee, could not in any form pass away the fee, subject to the estate of the other joint-tenant, it would not only be contrary to the power of alienation necessarily incident to a fee simple, but would be inconsistent with Lord Coke's own doctrine in a subsequent part of his commentary. See the case of an estate to father and son and the heirs of the father, *post. 367. b.* See also *post. sect. 578*. Indeed Lord Coke's position, thus qualified, appears to have a strictness in it, which, with some, may perhaps render it questionable. However, he seems justified by the words of the year-book, which he cites as his authority; for they are, that, *if two have land to them and the heirs of one, he who hath fee cannot grant the reversion of his companion to another; but, if both aliene, all passeth.*"

## Joint-Tenants,

[G]

(U) Leases by one. In what Case they shall bind 14 Vin. 500.  
the other.

TWO joint-tenants, each of them as they are seised *per my et per tout*, may make a lease of the whole, although his moiety will only pass, and they will be several terms as they arise from the

the several interests of several persons, though they are the same in point of duration. *Per Lee C. J. 1 Willf. 1.*

24 Vin. 509.

(L. a) Survivorship. In what Cases.

**I**F a joint estate is assigned in trust, and one of the *cestui que trusts* dies, the trust survives for the benefit of the surviving *cestui que trust*, against the creditors of the deceased, in equity, as well as at law. *Rex v. Williams, Hil. 1735. Bunb. 342.*

24 Vin. 517.

(O. a) Tenants in Common. Of what.

1. **I**F *A.*, seised in fee, conveys to trustees to uses, to the use of his children and their heirs *equally to be divided amongst them*, it is a tenancy in common, as well as in a will. *Goodtitle v. Stokes, 1 Willf. 341.*

2. Surrender of a copyhold to the use of *A.*, *B.*, and *C.*, and their heirs equally to be divided betwixt them and their heirs respectively; held by two judges a tenancy in common, by reason of the apparent intent of the surrenderor, against the opinion of

In note 4th to Harg. Co. Litt. 190 b.

*Holt C. J.*, who thought it a joint-tenancy. *Fisher v. Wigg, 1 P. Wms. 14.*  
It is said, that as this case, in 12 Mod. (Cases B. R.) Lord *Raymond* and *P. Wms.*, is reported very much at length, and the arguments on each side are very elaborate; it is an authority fit to be resorted to wherever the doubt is, Whether there shall be a tenancy in common or a joint-tenancy? In *Springer v. Philips*, 1 Eq. Ca. Ab. 291. the judgment is said to have been reversed; but that is denied by *Lee, C. J.* in 1 Willf. 341. In *Rigden v. Vallier*, 3 Atk. 731. 2 Vef. 252. the opinion of *Gould* and *Tourton* is affirmed by *Ld. Hardwicke*, contrary to the opinion of *Holt*; and the doctrine extended to a covenant to stand seised. In *Goodtitle v. Stokes*, 1 Willf. 341. it is extended to the case of a lease and release; and in *Denn v. Gaskin*, Cowp. 660. Lord *Mansfield* says, it is certainly the better opinion, more liberal, and better founded in law.

24 Vin. 517.

(P. a) Ouster. What shall be said an Ouster, &c. by one of the other.

1. **T**HE plaintiff and defendant were two tenants in common of certain customary lands, to which each of them became entitled by descent, and was, upon the death of his ancestor, admitted to his undivided moiety; but the defendant *alone* had received all the rents for upwards of 26 years. The question was, Whether the plaintiff was barred from recovering by the statute of limitations? It was said, on behalf of the plaintiff, that the statute of limitations only runs against those who are out of possession; that coparceners, joint-tenants, and tenants in common, have a joint possession, and the possession of one is the possession of both; that the perception of the profits does not amount to an expulsion; one tenant in common may indeed disseise another, but then it must be done by an actual disseisin, and not by a bare perception of the profits only; and the statute of limitations

tions never runs against a man, but where he is actually ousted or disseised. The court laid it down, that there must be an adverse possession, in order to enable the statute of limitations to run; that there must be a disseisin strictly proved; that, in this case, there was no adverse possession, no keeping the plaintiff out of possession; one tenant in common had received the rent, without accounting for it to the other; but there was no expulsion, no ouster; and *Taylor v. Horde*, (stated in Suppl. tit. *Disseisin*, ante) was referred to. Judgment was therefore given for the plaintiff. *Fairclaim v. Shackleton*, 5 Burr. 2604. 2 Blac. 690. S. C.

2. But where, upon a rule to shew cause why a new trial should not be granted, Lord Mansfield reported, that, from the year 1734, one tenant in common had been in the sole possession of the lands, without any claim or demand by any person claiming under the other; that no *actual ouster* was proved: but, upon the circumstances, his lordship had left it to the jury to say, whether there was not sufficient evidence before them to presume an *actual ouster*; and, supposing there was an *actual ouster*, in that case, the lessors of the plaintiff were barred by the statute of limitations. The jury found, that there was sufficient evidence to presume an *actual ouster*.—After the case had been argued, Lord Mansfield said “It is very true that I told the jury, they were warranted by the length of time in this case, to presume an *adverse possession* and *ouster* by one of the tenants in common of his companion; and I continue still of the same opinion.—Some ambiguity seems to have arisen from the term ACTUAL OUSTER, as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so; a man may come in by a rightful possession, and yet hold over *adversely*, without a title. If he does, such holding over, under circumstances, will be equivalent to an *actual ouster*. For instance, length of possession during a particular estate, as a term of 1000 years, or under a lease for lives, as long as the lives are in being, gives no title. But, if tenant *pur autre vie* hold over for 20 years after the death of *cestui que vie*, such holding over will, in ejectment, be a complete bar to the remainder man or reversioner; because it was *adverse* to his title. So, in the case of tenants in common, the possession of one tenant in common, *eo nomine*, as tenants in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him co-tenant. Nor indeed is a refusal to pay of itself sufficient, without denying his title. But if, upon demand by the co-tenant of his moiety, the other *denies to pay*, and *denies his title*, saying, he claims the whole and will not pay, and continues in possession; such possession is *adverse* and *ouster* enough.” And Ashburnell J. said, that, with respect to the above stated case of *Fairclaim v. Shackleton*, the present question was not properly before the court in that case. The single question there was, whether the plaintiff was barred by the statute



statute of limitations? The possession was a possession of 26 years; but, in that case, it was not left to the jury to presume either an adverse possession or an *actual ouster*. That fact, therefore, was not found, and it is not the province of the court, but of the jury, to presume facts. The court was of opinion, that an undisturbed and quiet possession for such a length of time, was a sufficient ground for the jury to presume an *actual ouster*, and therefore the rule for a new trial was discharged. *Doe v. Proffer*, *Cowp.* 217.

See *Davenport v. Tyrrell*, stated in Suppl. tit. *Parceners*, (L), *post*.

34 Vin. 512. (P. a) Ouster. *What shall be said to be an Ouster, &c. by the one of the other.*

1. **T**HIRTY-six years sole and uninterrupted possession by *one tenant in common*, without any account to or demand made, or claim set up by his *companion*, was held a sufficient ground for the jury to presume an *actual ouster* of the co-tenant. *Fisher and Taylor v. Proffer*, 1 *Cowp.* 217.

2. One tenant in common shall not bar the other by the statute of limitations, where there is no adverse possession. *Fairclaim on dem. of Empson v. Shackleton*, 5 *Burr.* 2604.

3. Confession of lease, entry, and ouster, is sufficient on an ejectment, in the case of a tenant in common, without proof of *actual ouster*. *Cotes v. Brydon*, 3 *Burr.* 1895.

34 Vin. 513. (R. a) Actions. *What lay at Common Law, or lie now for one Joint-tenant, &c. against another.*

1. **T**HE action of account given by 4 *Ann. c.* 16. is now seldom brought; as the party has in general a more beneficial remedy by action for money had and received, &c. or if the matter be of an intricate nature, the practice is to apply to a court of equity to compel an account. *Mifs. Treat.* 109. 111.

2. One tenant in common cannot avow *alone* for taking cattle *damage feasant*; but he ought also to make cognizance as bailiff of his companion. *Cully v. Spearman*, 2 *H. Bl.* 386.

3. Neither can he maintain an action on the case in the nature of waste against another tenant in common (in possession of the whole having a demise of the moiety from the first) for cutting down trees of a proper age and growth for being cut. *Martin v. Knowlys*, 8 *T. R.* 145.

(Z. a) Equity. Cases in Equity.

14 Vin. 525.

1. **T**RUST of a term in joint-tenancy shall go to the survivor in equity, as well as at law. *Rex v. Williams, Bunb. 342.*

2. Five persons purchased *West Thorock* level from the commissioners of sewers, and the purchase was to them as joint-tenants in fee; but they contributed rateably to the purchase, which was with intent to drain the level: after which several of them died: they were held tenants in common in equity; and though one of these five undertakers deserted the partnership for 30 years, yet he was afterwards let in. 3 *P. Wms.* 159. *Mich. 1732. Lake v. Craddock.*

3. If two tenants in common put out money as joint executors, it shall not survive, but shall go respectively to the representatives of each. 1 *Atk.* 467. *Feb. 1736. Partridge v. Pawlet.*

4. Testatrix devises two houses to *J. P. and J. H.* generally, and then says, "my meaning is, that the rents of my two houses should be equally shared between *J. P. and J. H.*" the devisees shall take as tenants in common and not as joint-tenants; and *J. H.* having, on the death of *J. P.*, taken possession of the two houses, as survivor, and enjoyed them ever since, must account for the rents, as far back as the death of *J. P.*, and not from the filing of the bill. 1 *Atk.* 493. *Hil. 1737. Prince v. Heylin.*

5. In the case of joint-tenants before severance, they must all agree, or no act can be done; in this case, Mr. *Seymour* and Mr. *Bennet*, the registrars of the prerogative office, not being able to agree upon a person to be appointed clerk, the court ordered them to draw lots, who should first nominate a clerk to fill up the vacancy. 2 *Atk.* 482. *Dec. 1742. Seymour v. Bennet.*

6. If two persons advance money upon a mortgage, though the conveyance be made to them jointly, it shall be a tenancy in common. 3 *Atk.* 734. *March 1751. Rigden v. Vallier.*

7. A tenant in common in possession was ordered to give security for payment of the proportion of rents to his co-tenant, otherwise a receiver was to be appointed. 4 *Brs. Ch. Rep.* 414. *July 1793. Street v. Anderton.*

[ B ]

## Jointress and Jointure.

24 Vin. 540. (B) Jointress restrained, or favoured. In what Cases.

See *Willoughby v. Willoughby*, stated in Suppl. tit. *Estate*, (B. b. 2), *ante*.

1. *A.* Under the will of his father, was tenant for life of certain estates, with a power to make a jointure, not exceeding 4000*l. per annum*, without any deduction or abatement for any *taxes, charges, or impositions*, imposed or to be imposed, parliamentary or otherwise, subject, nevertheless, to existing leases. *A.*, by articles, previous to his marriage with *B.*, covenanted to settle out of these estates to the yearly value of 3000*l.*, for a jointure, over and above all *reprises*, pursuant to the aforesaid power. By a subsequent settlement, reciting the power and the marriage, *A.* appointed lands to *B.*, and covenanted, that they should produce 3000*l. per annum, clear of all reprises.* *B.* survived *A.*, and, after his death, entered upon the lands, which fell short of producing 3000*l. per annum*, by a deficiency, *communibus annis*, of 600*l.*, the whole of which she claimed to be made up to her; while, on the other hand it was insisted, that *taxes and impositions* in the power meant only fixed and permanent taxes, and not the land-tax, which was fluctuating and annual. Lord *Hardwicke* clearly thought the land-tax within the power; and conceived that the power referred to such taxes and charges as were in being at the time of its execution, (*i. e.* in that court) by the articles; and that the jointress should, on the one hand, have the benefit, or, on the other, bear the loss of any subsequent variation. He reprehended the inaccuracy of the articles, in not pursuing the power; but thought the generic term *reprises* was there intended to take in taxes, charges, or impositions, according to the power to which they referred. And his lordship, after declaring that he considered this as a case of articles unexecuted in part, was of opinion, that *B.*, by virtue of the power, and the articles, was entitled to such a jointure out of the trust-estate, subject to the power, as, at the time of executing the power, was of the yearly value of 3000*l.*, free from all incumbrances, &c.; and also from all parliamentary taxes or impositions of such nature as were in being at the time of executing the power; and particularly the land-tax then in being. *Blandford v. Marlborough*, 2 *Atk.* 542.—*Tyrconnel v. Ancester*, 2 *Ves.* 500. S. P.

2. But,

2. But, in *Londonary v. Wayne*, Lord C. Henley was of opinion, that, where there is a settlement in jointure, the yearly value of the lands cannot be fixed with justice till the husband's death; since the wife cannot know the value but by inspection of leases, or by information, if the estates are in hand, and the rent often varies, the landlord being frequently obliged to take boons. *Amb. 427. See Pinnell v. Hallett, ib. 106.*

(H) Bar of Dower. In what Cases Jointure is a 14 Vin. 545.  
Bar.

1. IN *Vizard v. Longdale*, 5 Geo. 1. Sir J. Fekyll held, that these words in a bond, "to secure a sum of money for her (the wife's) livelihood and maintenance," were no bar of dower. But Lord C. King was of opinion that they were a bar, as being within the equity of the statute of jointures; and he therefore reversed Sir J. Fekyll's decree. In *Tinney v. Tinney*, 3 Atk. 8.

2. J. S. was seised of copyhold lands belonging to the manor of W., in which there is the following custom, viz. that the first wife of every tenant should have her free-bench in all the lands whereof her husband was ever seised during the coverture; the 2d wife a moiety, and the 3d a third part, so long as she kept her husband above ground. J. S., in consideration of a marriage and marriage portion, covenants with trustees, that, within two months after the marriage, he would settle all his lands to the following uses, viz. as to part of the lands, to the uses of himself and his wife for their lives, remainder to the first son, &c. in tail-male; and, as to the other moiety, to the use of himself for life, remainder to his first son, &c. with a proviso, that the lands so settled on the wife should be in lieu of her customary estate; and one of the points in this case was, whether this jointure, not being made expressly in lieu of her dower, but only said so in the proviso, and she being an infant at the time of making the articles, and not a party to them, she should be excluded from claiming her free-bench; and it was held, that she should be obliged to abide by her jointure, and *Vizard v. Longdale* (stated *supra*) was cited; but the Chancellor reversed the decree, and confined her to her settlement. *Jordan v. Savage*, Mich. 6 G. 2. 3 New Abr. 226.

3. By an indenture made previously to the marriage of Sir T. D. with M., afterwards his wife, between the said Sir T. D. of the first part, the said M. D. of the second part, and A. and B. of the third part, it was, amongst other things, agreed that M., in case she should survive Sir T. D., should have a clear annuity of 600*l.* during her life, for her jointure, and in full satisfaction and bar of all dower or thirds in all lands, &c. whereof Sir T. D. then was or thereafter should be seised, &c. and Sir T. D. covenanted with A. and B. that his heirs, executors, or administrators should pay the same accordingly. The deed was

## Jointrels and Jointure.

executed by Sir T. D. and the said M. D. in the presence of and attested by J. K., the guardian of M. D.; but M. D., who was entitled to a fortune of about 2000*l.*, was then, and at the time of the marriage, an infant under 21. Sir T. D. afterwards died intestate, being seised in fee of a real estate of 2600*l.* *per annum*. A question arose, whether M. D., being thus an infant at the time of her marriage, was, by the provision under this deed, barred of her dower, or not? Lord C. Henley was of opinion that she was not. From this decree there was an appeal to the House of Lords; and on behalf of the appellant it was argued, that the right of dower did not arise from contract, but was given by the law, and was exactly the same, whether the wife was of full age or not; and that jointures were given by the stat. of 27 H. 8. c. 10. s. 6. (which see stated in *pl.* 2. of the *fact.* to which this is a supplement,) as a more convenient provision, in lieu of dower at the common law; and it did not therefore depend upon the consent of the wife, that the jointure should take away her right of dower; but, having the jointure, she never gained any right of dower; that the words of the statute were general, *every woman married*, "having such jointure, shall not claim any dower," and included infants as well as adults; that were it otherwise, it might be to their disadvantage, by preventing their marriages; that the present was a good equitable jointure. The following question was then put to the judges, *viz.* "Whether a woman married under the age of 21 years, having, before such marriage, a jointure made to her in bar of her dower, is thereby bound and barred of dower, within stat. 27 H. 8. c. 10.?" The judges were divided in their opinion, three speaking in the negative, and four in the affirmative, whereupon the decree of the court of Chancery was reversed; and it was declared, that M. D. was barred of her dower by the deed in question; and directions were given for securing the jointure annuity of 600*l.*, with liberty for M. D., after Sir T. D.'s heir at law, who was then an infant, should attain 21, to apply to the court of Chancery to have the annuity charged upon his real estates. *Earl of Buckinghamshire v. Drury*, 5 Bro. Par. Ca. 570. See *Harg.* note 6. Co. Litt. 36. b. *Cray v. Willis*, 9 Vin. 249. 2. 3. *pl.* 18. See also the following cases, as to the powers of infants to bind their property by covenant on marriage; *Seamer v. Bingham*, 3 Atk. 54. *Harvey v. Asbely*, *ib.* 607. *Lucy v. Moor*, 3 Bro. Par. Ca. 514. *Durnford v. Lane*, 1 Bro. Ca. Ch. 106. *Williams*, *ib.* 152. and *Slocombe v. Glubb*, 2. *ib.* 545.

4. By indenture made previously to the marriage of A. B. with C. D. between M. C. widow, the mother of A. B., and the said A. B. of the first part, T. W., the father of C. D., of the second part, the said C. D. of the third part, and certain trustees of the fourth and fifth parts, for the considerations and for effectuating the purposes therein mentioned, M. C. and A. B. conveyed certain hereditaments to a trustee, to the intent that a recovery might be suffered thereof, which recovery, it was declared, should enure to the use.

*use of M. C. for life, remainder to the use of A. B. for life, remainder to trustees during, &c., to preserve contingent remainders, remainder, in case C. D. should survive A. B., to the use of C. D., in case the marriage should take effect, for her life, as part of the jointure and provision agreed to be made and secured to her upon the treaty of the said marriage, and in lieu, bar, and recompence of all dower and thirds, &c. which C. D. might otherwise claim in any of the lands, &c. of A. B., remainder over.* By another indenture, dated about six weeks after the first, and also previous to the marriage, and made between T. P., the uncle of A. B. of the first part, E. P., a trustee, of the second part, A. B. of the third part, and C. D. of the fourth part, recited to be made, in order to make some further provision for C. D., in case the marriage should take effect; it was covenanted and declared, that a surrender therein stated to have been made by T. P. to E. P. of certain copyhold lands should enure, after the marriage, in trust for T. P. for life, remainder in trust for A. B. for life, remainder, in case the marriage should take effect and C. D. should survive A. B., in trust for C. D. for life, in case she should so long continue a widow, remainder over. This last deed, however, was not said to be in bar of C. D.'s dower, or to be intended as part of her jointure, except by the expression "further provision." C. D., at the time of the marriage which afterwards took effect with assent of T. W. her father, was an infant of about 17, and had a portion of 2000*l.* A. B. died in the lifetime of C. D. seised of some small unsettled freehold estates, and of a copyhold estate unsettled of about 400*l. per annum*, to the whole of which, by the custom, the widow of a tenant dying seised was entitled for life, (as her free bench), and also of a personal estate of about 20,000*l.* The freehold estate in jointure was about 100*l. per annum*, but M. C. who had it for her life, was living. The copyhold estate in jointure was about 30*l. per annum*, and T. C., who had it for his life, was dead. The questions were, whether C. D., being an infant at her marriage, was barred of her dower and free bench by these settlements, or not; and, if not, whether she should have both jointure and dower, or be put to her election? Sir R. P. Arden at the Rolls, conceived the settlement made by the second deed to be the other provision alluded to by the first. He then proceeded to consider, whether, by virtue of these two deeds, the wife was barred of dower. He was clearly of opinion, from the cases which he cited, that a contract entered into by an infant, though with the consent of her guardians, did not bind her when she came of age. He conceived that if, in the case of *Drury v. Drury*, or *Buckinghamshire v. Drury* (already stated) the provision had not been competent, it would not have bound her; and he even doubted, whether, if a jointure *at law* was entirety, as if 1*l.* a year or some such thing was settled upon a woman, it would bind her; though on this he gave no positive opinion. He asked whether it was fair to infer that, because that case had determined that a good competent provision, which was equally beneficial as a

## Jointress and Jointure.

jointure at law, was a good equitable jointure, a court of equity would compel an infant to accept a jointure which was not equivalent. He thought the provision in the present case was incompetent and unjust, and therefore was not to be supported by the court. And his Honor decreed, that the widow was not bound by the two settlements, but should have her election. *Caruthers v. Caruthers*. At the Rolls, *MS. Rep.*

[G]

## Journeys.

14 Vin. 559. (A) Journeys Accounts. What it is, and Proceedings.

1. THE learning on this subject is now of little use, it being customary to enter a judgment that the writ be quashed, and then to sue out another.

2. And by stat. 8 & 9 *Will. 3. c. 11. f. 7.* the death of one plaintiff or defendant, where there is another surviving, shall not abate the suit. The death to be suggested on the roll. And by *f. 6.* death of the party, after interlocutory judgment, shall not abate the suit.

3. If a plaint be levied in an *inferior* court within the six years, and then it is removed into the king's bench by *habeas corpus*, and the plaintiff declares here *de novo*, and the defendant pleads the statute of limitations, the plaintiff may reply, and shew the plaintiff in the inferior court, and that will be sufficient to avoid the statute. 1 *Lord Raym.* 553. 2 *Stra.* 719. 2 *Lord Raym.* 1427. *S. C.*

4. If a new action be brought within half a year, after the abatement of the former, it would be sufficient to avoid the statute. 2 *Cowp.* 738, 40.

[D]

## Ireland.

14 Vin. 566.

(A) How far bound by *English* Statutes.

1 22 *GEO. 3. c. 53.* was made to repeal the 6 *G. 1.* by which the dependency of *Ireland* was asserted and declared.

2. 23 *G. 3. c. 28.*, the right claimed by the people of *Ireland* to be bound only by laws enacted by his majesty and the parliament

## Ireland.

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ment of that kingdom, in all cases whatever, and to have all actions and suits at law or in equity instituted in that kingdom decided in the courts there finally and without appeal, is declared to be established and ascertained for ever.

3. By 40 G. 3. c. 67. the kingdoms of *Great Britain and Ireland* are united into one kingdom by the name of the United Kingdom of *Great Britain and Ireland*.

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## Judgment.

[G]

(D) In what Cases, after a Verdict, Judgment shall <sup>14 Vin. 585.</sup> not be given *upon the Verdict*, but upon the *Declaration, Plea*, or other Part of the Record.

WHERE the plea confesses the action, and does not sufficiently avoid it, judgment shall be given on the confession, without regard to a verdict. *Broome v. Rice*, 2 *Str.* 873.

(F) Release. What collateral Act will hinder a <sup>14 Vin. 591.</sup> Judgment, *viz.* Release to one of the Defendants.

1. A *Remittit damna* of so much is a release for so much, and is like acknowledgment of satisfaction, and there need be no judgment *quod eat sine die* as to that part. *Eyre v. Mount*. H. 9 G. 2. B. R. H. 207.

2. If two are jointly and severally bound, a release to one discharges the other. 1 *Lord Raym.* 691.

3. Where the sum demanded depends upon a deed or other instrument, and on nothing *extrinsic*, as in debt or covenant to pay 20*l.*, there can be no *remittitur*, for the variance which is made is inconsistent with the deed or instrument upon which the duty demanded depends; otherwise, where it may be more or less by matter *extrinsic*; as in debt for rent, if more be demanded than is due, the overplus may be released; for the variance is not *inconsistent with the deed*, and as the plaintiff is to recover on the trial only what appears in evidence to be due, so on demurrer he is to have judgment for no more than he ought to recover, and may remit the rest. *Inledew v. Cripps*, 2 *Salk.* 659. 7 *Mod.* 87. S. C. 2 *Lord Raym.* 814.



24 Vin. 503. (G) Where a *Release*, or *Nolle Prosequi* of Part of the Thing will be a Release of all.

1. **I**N trespass against several, a *nolle prosequi* may be entered as to one, and it shall not release the other. 1 *Wils.* 90.
2. It seems that in an *assumpsit*, or other action upon contract, against several defendants, the plaintiff cannot enter a *nolle prosequi* as to one, unless it be for some matter operating in his personal discharge, without releasing the others. 1 *Wils.* 90.
3. It seems clear that when any action founded upon a *tort*, such as assault and battery, false imprisonment, trover, and the like, is brought against several defendants, though they all join in the same plea, and be found jointly guilty, yet the plaintiff may after *verdict* enter a *nolle prosequi* as to some of them, and take his judgment against the rest. *Cow v. Lowther*, 1 *Lord Raym.* 597. *Dale v. Eyre*, 1 *Wils.* 306.

24 Vin. 503. (G. 2) Aided by Release of Damages, or what else would make Error.

1. **W**HERE in an action against several defendants the jury by mistake have assessed several damages, the plaintiff may cure it by entering a *nolle prosequi* as to one of the defendants and taking judgment against the others; or he may enter a *remittitur* as to the lesser damages; or even without entering a *remittitur*, he may take judgment against all the defendants for the greater damages. 1 *Wils.* 30.
2. Where the jury give greater damages than the plaintiff has declared for, it may be cured by entering a *remittitur* of the surplus, before judgment. 2 *Stra.* 1110. 2 *Tidd's Prac.* 798.
3. Where the duty to be recovered is certain and entire, upon the face of the contract; or specialty, a demand of more than is due is bad, and cannot be aided by the entry of a *remittitur*; but where the duty is composed of several parcels, a demand of more than is due may be aided by a *remittitur* of the overplus, for the plaintiff must recover according to the proof, and not to the demand. *Incladow v. Cripps*, 2 *Lord Raym.* 815.

14 Vin. 602. (N) When a Plea is good for Part, and ill for other Part, how Judgment shall be given.

1. **I**F two or more join in a defence which is a sufficient justification for one, but no justification for the others, the plea is bad as to all; for the court cannot sever it, and say that one is guilty, and the other not, when they all put themselves upon the same terms. *Phillips v. Biron*, 1 *Stra.* 509.
2. *Trespass*

2. Trespafs and false imprisonment against five defendants. They all join in a plea of not guilty as to all but eight days imprisonment, which they justify under process from the university of Oxford; but this process being no justification to some of the defendants, though it might be as to the others, judgment was given against all the defendants. *Smith v. Bouchier*, 2 *Str.* 994.

3. In trespafs and false imprisonment against the plaintiff in the action and the officer, they jointly justified under a process from the court at *Welch Pool*, returnable at the next court. And it not being shewn that any return was made, the court held that the officer was a trespasser *ab initio*, and that the plaintiff, by joining with him in the plea, is equally affected by the defect of it. And therefore there was judgment against them both. *Middleton v. Price*, 2 *Str.* 1184.

(O. 2) Judgment *against whom*, when two are sued 14 Vin. 605.  
and one acquitted.

THERE is a difference between an action of conspiracy against two persons, and an action upon the case founded on a wrong done by two persons; in the first, if one be found not guilty, the judgment must be arrested, but not if one be found not guilty in the latter case. *Subley v. Mott*, 1 *Wils.* 210.

(P) By Prayer.

14 Vin. 606.

A Replication to a plea in abatement, traversing any of the facts in the plea, must pray a judgment in chief. *Bonner v. Hale*, 1 *Lord Raym.* 338.

(Q) *In what Actions.* Judgment being given shall 14 Vin. 608.  
be a Bar of others. (Actions of another Sort.)

1. AN account stated is no plea in bar to a demand of a debt of the same nature. *Roades v. Barnes*, 1 *Burr.* 9.

2. A note of hand cannot be pleaded in bar to an action upon simple contract; though a bond may, but not one bond to another. *Ibid.*

3. A *superfedens* obtained after judgment cannot be pleaded in bar to an action on such judgment. *Topping v. Ryan*, 1 *Term Rep.* 273.

4. If a servant, seduced from his master, has paid the penalty stipulated by his articles for leaving him, this is a bar to an action against the person seducing him. *Bird v. Randall*, 3 *Burr.* 1345.

5. A judgment for a defendant on one personal action, is a good bar to another personal action for the same cause. But the cause of action must be specially stated to be the same. As where the

the defendant, being a creditor to a bankrupt, had signed judgment on a bond of the bankrupt's on the 9th *March*, and sued out a writ of *fi. fa.* thereon, under which the sheriff levied the money; on the 9th *April* the commission was sued out, and in *Michaelmas* term following the assignees brought trover for the goods so taken under the execution, and had a verdict against them. They afterwards brought *assumpsit* for the money arising from the sale of the same goods, the defendant having pleaded the former recovery in trover, it was held ill, for want of the proper averment to support the plea, viz. That the question or cause of action was the same. Afterwards the parties going to trial on other issues, the special matter further found was, that the bankrupt had committed an act of bankruptcy before the 9th *March*, viz. in the *February* preceding, but the court held clearly that the assignees having failed in the action of trover, could not recover in *assumpsit* for the price of the same goods. And the test when one action shall be a bar to another is, when the same evidence is required in both actions, as was the case in this. *Hitchen v. Campbell*, 2 *Bl. Rep.* 827. 3 *Wils.* 304.

24 Vin. 610. (Q. 4) Judgment or Recovery in one Action, where a Bar in another, being brought by the same or by different Persons.

A Judgment for the defendant in trover is no bar to an action for money had and received by the defendant for the use of the plaintiff. — *v. Campbell*, 3 *Wils.* 240.

24 Vin. 612. (T) In what Cases one or several Judgments shall be given; and what shall be said one and what several Judgments.

1. WHERE the count was of a joint trespass, and the jury found the defendants guilty of a joint trespass, and yet severed the damages: the court were of opinion that in such case the damages could not be severed. And the judgment was therefore reversed. *Hill v. Goodchild*, 5 *Burr.* 2791.

2. One fine cannot be assessed on the admission to several copyhold tenements. If any count in the declaration state one fine, although the other state several, and there are entire damages, and judgment for the plaintiff, it is error. *Grant v. Aple*, 2 *Dougl.* 722.

24 Vin. 621.

(X. 5) Revived by Scire Facias.

1. IN *Cosgayne v. Fly*, 2 *Bl. Rep.* 995. on a judgment of above twenty years old; and in *Bagnall v. Gray*, *ib.* 1140. on a judgment of ten years old, the court of C. B. gave leave to sue out  
out

out a *sci. fa.*; but execution only to issue on a return of *scire feci*, or an affidavit of personal service on the defendant.

2. If an executor bring a *scire facias* on a judgment or recognizance, and obtain judgment *quod habeat executionem*, and die intestate, the administrator *de bonis non* must bring a *scire facias* on the original judgment, and cannot proceed upon the judgment on the *scire facias*. *Semble* *Ld. Raym.* 1049.

3. If the plaintiff in an action after judgment and a writ of error allowed, become bankrupt, his assignees cannot sue out a *sci. fa.* in their own names to compel an assignment of errors till some judgment be given, and then it must be done immediately after such judgment; but they should go on with the writ of error in the bankrupt's name till judgment. *1 T. R.* 453. *Vide* *3 T. R.* 437.

4. The husband cannot have execution for the costs on a plea of *coverture* found for the defendant, without a *scire facias*. *2 Dougl.* 637.

5. A *scire facias* on a judgment must pursue the terms of the judgment. And therefore where an executor pleads *plene administravit*, and the plaintiff does not take issue on it, but takes judgment of assets *quando acciderint*, the *scire facias* on that judgment must pray execution of such assets only as have come to the executor's hands since the former judgment; and if it prays execution of assets generally, without confining it to that time, it cannot be supported. *Mara v. Quin*, *6 T. R.* 1.

6. The year must be computed from the day of signing judgment. *Sympton v. Gray, Barnes*, 197.

7. And it is to be reckoned by calendar months, and not by terms. *Winter v. Lightbound*, *1 Stra.* 301.

8. If the plaintiff has been prevented from suing out execution within the year, by the defendant's obtaining an injunction out of Chancery, he may sue out execution afterwards without a *scire facias*. *Michel v. Cue*, *2 Burr.* 660.

9. The *scire facias* must be sued out of the same court where the judgment was given, if the record remains there. *Com. Dig. tit. Pleader* (4 L. 3).

10. If the judgment be of more than twenty years standing, there must be a rule to shew cause, supported by an affidavit that the judgment is unsatisfied. *Blakely v. Vincent*, *T.* 35 G. 3. *Waters v. Hales*, *E.* 37 G. 3. cited *Tidd's Prac.* 404.

11. In debt on bond, conditioned for the payment of money by instalments, where the proceedings are stayed on payment of one or more instalments, judgment is entered as a security for the remainder, with a stay of execution till they become due; and in such case there seems to be no necessity for a *scire facias* if execution be taken within a year after each default. *Darby v. Wilkins*, *2 Stra.* 957. *S. P.* 2 Bl. Rep. 706.

12. It has been holden that no *special* execution can be taken out on a *general* judgment against a defendant, before his discharge under an insolvent act, without first suing out a *scire facias*. *Buxton v. Mardin*, *1 Term Rep.* 80.

13. Where

13. Where a new person, who was not a party to a judgment, derives a benefit by, or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment. *Penoyer v. Brace*, 1 *Ld. Raym.* 245.

14. Where there are two or more plaintiffs or defendants in a personal action, and one or more of them die after judgment, execution by *fi. fa.* or *ca. fa.* may be had for or against the survivors, without a *scire facias*. *Penoyer v. Brace*, 1 *Ld. Raym.* 25.

15. If a verdict be found on a plea of coverture, for the wife, who has been sued as a feme sole, it has been determined that it is irregular to sue out execution for the costs in the name of husband and wife without a *scire facias*; but the wife may take out execution in her own name, because the plaintiff having declared against her as sole is concluded from denying it. *Woolley v. Rainer*, 2 *Dougl.* 637.

16. Where the defendant dies after interlocutory, and before final judgment, the plaintiff must sue out two writs of *scire facias* to entitle himself to take out execution; one before final judgment to make the executors or administrators parties to the record; the other after final judgment to give them an opportunity of pleading the want of assets, or any other matter that an executor may plead in his defence to a *scire facias* brought upon a final judgment against his testator; for it would be unreasonable that the executors or administrators should be in a worse situation, where their testator or intestate died before final judgment than they would have been in if he had died after. *Tomkins v. Gratton*, *Say. Rep.* 266.

17. If an executor brings a *scire facias* on a judgment, and has judgment *quod habeat executionem*, and dies intestate, the administrator *de bonis non* must bring a *scire facias* upon the original judgment, and cannot proceed upon the judgment in the *scire facias*. *Treviban v. Lawrence*, 2 *Ld. Raym.* 1049.

18. A *scire facias* to revive a judgment entered on a bond securing an annuity granted before stat. 17 G. 3. c. 26. s. 2. commanding that no action shall be brought on any judgment already entered, (unless certain requisites were complied with) is an action within that clause. *Fenner v. Evans*, 1 *T. R.* 269.

19. A *scire facias* to revive a former judgment is so far a continuation of the same action, that if the plaintiff's testator had agreed not to bring a writ of error in that former action, such agreement shall bind his executors upon the *scire facias* being brought against them. *Executors of Wright v. Nutt*, 1 *T. R.* 388.

24 Vin. 627.

### (Y) When to be signed and entered.

1. **I**N debt for a penalty for non-performance of covenants, judgment on demurrer may be entered up for the penalty, in like manner as before the stat. 8 & 9 W. 3. c. 11.; but then it can stand only as security for the damages sustained. *Goodwin v. Croywle*. 1 *Cowp.* 357.

2. Plaintiff

2. Plaintiff is not obliged to proceed to final judgment next term after trial, therefore if verdict in *Hil. vac.* defendant renders himself in *Easter*, and plaintiff might have final judgment, but does not sign it till *Trinity*, and in *Michaelmas* charges defendant in execution, it is well, and defendant is not entitled to *superfedeas*. *Pierce v. —*, *H. 24 G. 2. 1 Wils. 297.*

3. The court will give leave in the first instance to enter up judgment on a verdict reduced by an award. *Higginson v. Nesbitt*, *1 Bos. & Pull. 97.*

4. The court will not order plaintiff's attorney to bring in and enter up judgment on the motion of a stranger, though in order that it may be used as evidence on a penal statute. *Hudson v. Smith*, *M. 11 G. 2. Andr. 22.*

5. If plaintiff in an action for arrears, dies before judgment on a special verdict, judgment may be entered as of the term in which the *posseas* was returnable. *Trelawney v. Winchester*, *1 Burr. 29.*

6. Where defendant dies pending time of argument or consideration of the court, judgment entered *nunc pro tunc*. *Ashley v. Reynolds*, *2 Stra. 915.*

7. If defendant in error dies pending a *cur. advisare vult*, the court will give leave to enter judgment *nunc pro tunc*. *Cumber v. Wane*, *1 Stra. 426.*

8. The court will not give leave to enter up a judgment of 20 years standing *nunc pro tunc*. *Flower v. E. Bolingbroke*, *1 Stra. 639.*

9. If defendant dies after judgment pronounced for him, the court will give leave to enter it up as of that term, though the application is six or seven terms after. *Norwich v. Berry*, *4 Burr. 2277.*

10. If an executor receive assets between the time of the plaintiff's suing out the writ and a judgment *quando acciderit*, upon *plene administravit* pleaded, the court will permit the plaintiff, in his *scire facias*, to amend his judgment as to the time, when he could at the soonest have entered it up, unless the defendant can shew, that in point of fact some injustice will be done by it in the particular case. *Mora v. Quin*, *6 T. R. 1.*

11. By rule of *C. B.*, *E. 12 G. 2.*, it is ordered, that after the first day of the then next term, all *posseas* and inquisitions, on which final judgments are signed, shall be left with the prothonotaries, in order that the judgment may be immediately entered. *Barnes*, 259.

12. By rule of *B. R.* and *C. P. Hil. 35 G. 3.* it is ordered that after the first day of the next term no judgment shall be signed for non-payment of issue-money; but that it shall remain to be taxed as part of the costs in the cause. *6 T. R. 218.* *2 H. Bl. Fuller v. Osborne*, *6 T. R. 477.*

13. The court will not allow a plaintiff to sign judgment, because the defendant refuses to pay for half the paper-books delivered to the Judges, the case being within the above rule. *Fulham v. Bagshaw*, *1 Bos. & Pull. 292.*

14. Plain-

## Judgment.

14. Plaintiff cannot sign judgment for the defendant's refusing to pay 4d. for the warrant of attorney when the copy of the declaration is delivered to him. *O'Neale v. Price*, 4 T. R. 370.

15. Where either party dies after verdict in vacation, judgment may be entered at common law in that vacation, as of the preceding term. *Barnes*, 266. 1 *Ld. Raym.* 695. 2 *Ibid.* 766. 849. 869. 6 T. R. 368. 7 *lb.* 20. In such case, the roll ought to be brought in and filed before the effoign day of the subsequent term.

16. So where either party dies after verdict, judgment may, under 7 Car. 2. c. 8., be entered so as to support the proceedings at any time within two terms after the verdict. And at common law, if either party dies after special verdict, and pending the time for argument, &c. thereon, or on demurrer, motion in arrest of judgment, or for a new trial, judgment may be entered after the death, as of the term in which the *posse* was returnable, or in which judgment would otherwise have been signed *nunc pro tunc*. *Tidd's Prac.* 840. 842. 853.

17. Plaintiff cannot sign judgment for want of a plea without demanding one; though the defendant has not taken the declaration out of the office. *White v. Dent*, 1 Bos. & Pull. 341.

18. If defendant's attorney has undertaken to appear, judgment may be signed though appearance is not actually entered. *Barnes*, 238.

19. If declaration is left in the office before appearance or notice, then appearance, and then notice in another term, and judgment signed next term, it is good; for the declaration is only well delivered from the notice. *Barnes*, 242.

20. If defendant has time, on terms of pleading issuably, and puts in a sham demurrer, judgment may be signed; but not if it is a fair demurrer. *Gray v. Ashton*, 3 Burr. 1788.

21. If defendant, when under an order to plead issuably, puts in a plea, which, though informal, goes to the substance of the action, the plaintiff cannot sign judgment as for want of a plea. *Thelluson v. Smith*, 5 T. R. 152.

22. Judgment was signed on the 2d of November, plaintiff filed common bail on the 3d; and a rule was granted to shew cause, why the judgment should not be set aside for irregularity. The rule was, however, discharged upon its being stated by the Master to be the constant practice to sign judgments on the 2d of November before the effoign-day, in all cases where common bail is filed between the 2d and the 6th November. *Wansley v. Moore*, 5 T. R. 65.

23. In B. R. judgment may be signed for want of a plea at any time after twenty-four hours from the time of the plea demanded. *Dyce v. Burgoyne*, 1 T. R. 454.

24. And this is the rule, whether the time for pleading be or be not expired when such demand is made. *Rowles v. Edwards*, 4 T. R. 118.

25. Where the declaration, filed in the office before defendant's appearance, was endorsed, *filed conditionally*, and judgment after-

wards signed for want of a plea, the court held it irregular, though the notice served on the defendant was of a declaration *generally*. *Cort v. Jacques*, 8 T. R. 77.

26. If process is returnable 15th November, declaration, with notice to plead in eight days, left in the office 24th November, and defendant does not plead nor file common bail, and plaintiff files common bail, and signs judgment after, it is well. He might have signed it immediately after the eight days. *Shadwell v. Angell*, 2 Burr. 55.

27. No proceedings having been had for above a year, the plaintiff, two days before *Hilary Term*, gave notice of his intention to proceed. Two days after the term he served a rule to plead, and the same vacation judgment was signed for want of a plea, which was held regular. *Milbourne v. Nixon*, 2 T. R. 40.

28. If defendant do not rejoin, the plaintiff may strike out the previous pleadings and enter judgment as for want of a plea. *Petrie v. Fitzroy*, 5 T. R. 152.

29. To an action of debt on bond, the defendant pleaded *solvit ad diem*, and entered it in the general-issue book; the plaintiff was thereby enabled to sign judgment as for want of a plea, it being considered as a waiver of the imparlance to which the defendant was entitled. *Lockhart v. Mackreth*, 5 T. R. 661.

30. If declaration is left in the office *de bene esse* and notice given, defendant must take it out and pay it, or plaintiff may refuse plea and sign judgment. *Keeling v. Newton*, 1 Wils. 173.

31. Judgment cannot be signed till summons for time is discharged, though defendant's attorney did not attend. *Barnes*, 240. 255.

32. On order for two days' time, judgment cannot be signed till third day in the afternoon. *Barnes*, 266.

33. Though a rule to plead expire on a *dies non* the defendant is bound to plead on or before that day, and if he do not, judgment may be signed against him on the next day. *Mesure v. Britton*, 2 H. Bl. 616.

34. On a rule to plead, &c. in four days, if the defendant delay till the morning of the 5th day, the plaintiff may sign judgment. *Hufelar v. Ansell*, 1 Dougl. 197.

35. On a rule to plead, reply, &c. in four days, if the party on whom the rule is made delay complying with it till the morning of the 5th day, the adverse party may refuse to receive it, and sign judgment. *Thomson v. Ryall*, 4 T. R. 195.

## (C. a) Arrest of Judgment, for what; how; when. 14 Vin. 628.

1. JUDGMENT after verdict shall not be arrested for an objection that would have been good on demurrer. Thus, in debt on security-bond of a bailiff of G. hundred, conditioned if he duly executes his office *within* that hundred, and executes all warrants directed to him, and makes due returns, then, &c. plea of



of performance; replication, that defendant had not duly executed a warrant directed to him; rejoinder, he had: verdict against him: he shall not arrest judgment, because it is not alleged, that the warrant was directed to him as bailiff of G. hundred. *Weston v. Mason*, 3 Burr. 1725.

2. *Per Curiam*. After judgment on demurrer, defendant shall not come to arrest judgment on the return of the inquiry, for an exception that might have been taken on arguing the demurrer. *Secus*, in case of judgment by default, or if the fault arises on writ of inquiry, or verdict. *Edwards v. Blunt*, 1 Stra. 425.

3. It is now settled, (though otherwise formerly) that judgment cannot be arrested for *extrinsic* or foreign matter, not appearing on the face of the record, but the Court are to judge upon the record itself, that their successors may know the grounds of their judgment. 1 *Ld. Raym.* 232. 4 Burr. 2287.

4. At common law, where any thing is omitted in the declaration, though it be matter of substance, if it be such as that, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment. 1 *T. R.* 141. 3 *Ibid* 147. 7 *Ibid* 518.

5. This rule is, however, to be understood with some limitation, for it appears to be, that where the plaintiff has stated his title or ground of action defectively or inaccurately, it is a fair presumption, after verdict, that they were proved; but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for such presumption. 2 *Dougl.* 679.

6. After verdict the Court will do what they can to help the declaration, but not after judgment by default: so, if plaintiff has not averred performance or readiness to perform what was to be done on his part, judgment shall be arrested. *Collins v. Gibbs*, 2 Burr. 899.

7. Sunday is not esteemed one of the four days within which arrest of judgment shall be moved for. 4 Burr. 2130. 2 *Dougl.* 745.

8. Motion in arrest of judgment on the crown side may be made at any time before sentence pronounced. 2 Burr. 799.

9. Motion in arrest of judgment must be on the appearance day of the return of *hab. cor. jur.* *Barnes*, 445.

10. If it is to be moved the last day of term, there must be notice given. *Barnes*, 247.

11. Defendant in an indictment may move in arrest of judgment any time before judgment signed. *Ren v. Hays*, 2 Stra. 843. 5 *T. R.* 445. Though a new trial has been previously moved for. *Taylor v. Whitehead*, 2 *Dougl.* 745.

12. If there is a demurrer to one count, and a verdict for plaintiff on the other, judgment cannot be arrested till the demurrer is determined, for till then the proceedings are not complete. *Goodright v. Hodgson*, *Andr.* 282.

13. The court will not arrest the judgment in an action for words in one count, though some of them be not actionable. *Secus*, where there are two counts, and a general verdict is given for the plaintiff. *Lloyd v. Morris, Willes, 443.*

14. If some counts in a declaration are good, and some bad, and general damages are given, the court will arrest the judgment *in toto*, and will not award a *venire de novo*. *Holt v. Scholefield, 6 T. R. 691.*

15. *A.* having declared on a promissory note against *B.*, made by *C.* to *A.*, by him indorsed to *B.*, and by him again indorsed to *A.*, and having obtained a verdict, the judgment was arrested on the ground of a circuitry of action. *Bishop v. Haywood, 4 T. R. 470.*

16. Where in an action of *assumpsit* on a bill of exchange with the usual money counts, the defendant pleads *nil debet* to the count on the bill, but does not plead at all to the other counts, after a verdict for the plaintiff the defendant shall not take advantage of his own mispleading in arrest of judgment. *Harvey v. Richards, 1 H. B. 644.*

(D. a. 2) Set aside, for what and how. *Irregularity* 14 Vin. 630.  
in signing it. Want of or Insufficiency in a Plea.

1. JUDGMENT may be signed for want of a plea at any time after 24 hours from the time of the plea demanded. *Dyche v. Burgoyne, 1 T. R. 454.*

2. But plaintiff cannot sign judgment for want of a plea till the expiration of 24 hours after demand of plea, whether the time for pleading be or be not expired when such demand is made. *Rowles v. Edwards, 4 T. R. 118.*

3. If defendant, being under an order to plead *issuably*, plead several pleas, one of which is not *issuable*, the plaintiff may sign judgment as for want of a plea, though the others be *issuable* pleas; for the plea which was pleaded in disobedience to the order vitiated all the others. *Waterfall v. Glode, 3 T. R. 305.*

4. Where a defendant, when under an order to plead *issuably*, put in a plea, though informal, which went to the substance of the action, the court held that the plaintiff could not sign judgment as for want of a plea. *Thelluson v. Smith, 5 T. R. 152.*

5. If the defendant suffer plaintiff to file common bail for him under the statute, the latter may, upon the expiration of the rule to plead, sign judgment for want of plea without any demand of a plea. *Palk v. Rendle, 8 T. R. 465.*

6. *Aliter* where the defendant enters an appearance, though he does not take the declaration out of the office. *White v. Dent, 1 Bos. & Pull. 341.*

7. Not guilty pleaded to an action of debt on a penal statute is not such a nullity as warrants judgment to be signed for want of a plea. *Coppin q. t. v. Carter, 1 T. R. 46.*

## Judgment.

8. Where the defendant is joined with his wife in the writ, he may enter an appearance for himself only, and in such case the plaintiff cannot sign judgment for want of a plea, without demanding a plea. *Clark v. Norris & Ux.*, 1 H. B. 235.

9. If defendant, after craving *oyer* of a deed, do not set forth the *whole* deed, the plaintiff may sign judgment as for want of a plea, or the Court will quash the plea. *Wallace v. The Ducheſs of Cumberland*, 4 T. R. 370.

10. The defendant having surrendered in discharge of his bail in *K. B.* removed himself by *habeas corpus* into the *Fleet*, and plaintiff declared against him there after the end of the second term after the writ was returnable, a judgment of *non pro* signed afterwards was irregular. *Sherſon v. Hughes*, 5 T. R. 35.

11. In general a prisoner need not give notice of his having filed a plea; but when he pleads at an earlier time than by the rules of the court he is compellable to plead, he must give notice, and if he do not, the plaintiff may sign judgment as for want of a plea. *Rufholm v. Chapman*, 5 T. R. 473. *Parkinson v. Thomson*, 8 T. R. 596.

12. When the defendant pleads a plea not adapted to the nature of the action, as *nil debet* in *assumpsit*, &c. the plaintiff may consider it as a nullity, and sign judgment. *Barnes*, 257.

24 Vin. 631. (D. a. 3) Set aside for Irregularity in signing it. *Not paying for the Issue, &c.*

ON the delivery of the issue, or returning the paper book, the defendant was formerly obliged to pay for copies of the pleadings, except in actions by a pauper, or against an attorney, or prisoner; and in a *qui tam* action he paid double. This was called issue-money, on non-payment of which the plaintiff might have signed judgment. But by a late rule of court no judgment shall be signed for non-payment of issue-money, but the same shall remain to be taxed, as part of the costs in the cause. *R. H.* 35 Geo. 3. 6 T. R. 218. Which rule is construed to extend not only to general issues, but also to all special issues, and the demurrer and paper books made up therein. 6 T. R. 477. *R. M.* 36 G. 3.

24 Vin. 631. (E. a) Set aside for Irregularity in signing it. *Want of Notice of Writ or Declaration.*

PLAINTIFF having appeared for defendant pursuant to act of parliament, left a declaration in the office in *Easter* term, and in *Trinity* term gave notice thereof to defendant, and for want of plea signed judgment. Defendant applied to the court within *Trinity* term to set aside the judgment, the nature of the action being

## Judgment.

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being omitted in the notice, and on hearing counsel on both sides the judgment was set aside. In *Michaelmas* term following plaintiff gave new notice of the declaration, and signed a second judgment. The defendant applied again to the court to set that judgment aside, insisting that the declaration was well delivered from the time of serving the second notice only, and that the writ being returnable in *Easter* term last, the declaration was delivered too late, and the plaintiff must begin again; and the court were of that opinion, and ordered the second judgment to be set aside. *Barnes*, 291.

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## Jury.

[ G ]

See Trial.

(A. c. 2) Exempted from serving on Juries. Who are, and Remedy if returned. 21 Vin. 208.

IF the inhabitants of a district have enjoyed a prescriptive right of exemption from serving on juries, they are not liable to serve under any of the statutes relative to juries. *Rex v. Pugh*, 1 *Dougl.* 188.

(E. c) Challenge to the Array. Who may take it. 21 Vin 216.

1. AFTER entering into the common rule for a special jury, if one of the parties strike out hundredors, and at the trial challenge the array for want of hundredors, it is a contempt, and attachment shall issue. *Rex v. Burridge*, 1 *Str.* 593. *Ld. Raym.* 1364.

2. But if the defendant in an information obtain a rule for a special jury, the prosecutor takes the *venire* to the sheriff, the defendant may challenge the array if the sheriff has an interest in the cause, and it shall not be contempt. *Rex v. Johnson*, 2 *Str.* 1000.

3. The party to whom the sheriff is related cannot challenge the array for that reason. *Semb.* But if he do, and there is a demurrer *instantur* to that challenge, and before it is determined, the other party, for the sake of expedition, move to quash the array, the court will do it without the consent of the party challenging. *Kynaston v. Mayor of Shrewsbury*, *Andr.* 85. 104.

4. In an action on a bye-law, that no person who is not a freeman could keep any shop or expose any goods to sale by retail within the said city, excepting at fairs, it is a good challenge that the sheriff is a freeman. *Kerketh v. Braddock*, 3 *Burr.* 1847.

5. It is a good cause of challenge, if the jury is returned by an under-sheriff who is attorney in the cause. *Baylis v. Lucas, Corp.* 112.

21 Vin. 244. (Y. c.) Challenge. What Persons may be impanelled. (In respect of their Quality or Degree.)

1. **A** Knight need not be returned upon the panel in ejectment, on the demise of a peer. *Goodtitle v. Thruslout, 2 Stra.* 1023.

2. By stat. 24 G. 2. c. 18. challenge to the panel for want of a knight, when a peer is party, is taken away.

3. By stat. 3 G. 2. c. 25. *f.* 19. the sheriffs of the city of London for the time being shall not return any person to try any issue joined in *B. R.*, *C. B.*, or Exchequer, or to serve on any jury at the sessions of *oyer and terminer*, gaol-delivery, or sessions of the peace for the city of London, who shall not be a householder within the city, and have lands, tenements, or personal estate to the value of 100*l.*, and the same matter being alleged as cause of challenge, and so found, shall be admitted as a principal challenge, and the person challenged shall be examined on oath on the truth of the said matter.

4. And by *f.* 20. no person shall be returned to serve on a jury for the trial of a capital offence, not qualified to serve as a juror in civil causes.

21 Vin. 245. (Z. c. 2) Challenge. Freehold necessary or not, in what Cases.

1. **I**f a juryman in treason, brought to the book, says he has no freehold in the county, he shall be sworn upon a *voire dire* to that matter, and if he answer, he has none, he shall be set aside. *Townley's case, 1746. Foster, 7.*

2. If a juryman has freehold and copyhold amounting to 10*l. per annum*, it is a good qualification, though the freehold alone is under 10*l. per annum.* *Ibid.*

3. So, by stat. 3 G. 3. c. 7., in *Middlesex*, leaseholders having 50*l.* above ground-rents or other reservations, shall be obliged to serve on juries when summoned.

4. So, by stat. 3 G. 2. c. 25. *f.* 18., any leaseholder for the term of 500 years absolute, or for any term determinable on life or lives, of the clear yearly value of 20*l. per annum* over and above the rent reserved, is qualified to serve on juries.

(A. d. 3) Challenge (principal) or peremptory to the 21 Vin. 252.  
Jurors. What (is).

1. **C**HARLES Ratcliffe had been convicted of high treason; and, in *B. R., Mich. 20 G. 2.*, upon a collateral issue, that he was not the same person, a peremptory challenge was insisted on, and refused by *Ch. J. Lee.* 1 *Blac.* 4. 6. Vide *Foster*, 42. *Johnson's case*, *ib.* 46. and *Harg. Co. Litt.* 157. Note 8.

2. Any degree, even the *smallest* degree, of interest in the question depending, is a decisive objection to a juror. *Per Lord Mansfield.* 3 *Burr.* 1856.

3. A juror may be challenged *propter delictum*, as for conviction of treason, felony, perjury, or conspiracy; or if for some infamous offence, he has received judgment of the pillory, tumbrel, or the like, to be branded, whipped, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *premunire*, or forgery. A juror may himself be examined on his *voire dire*, with regard to such causes of challenge as are not to his dishonour or discredit, but not with regard to any crime, or any thing which tends to his disgrace or disadvantage.

4. In an action by a corporation, it is a principal challenge to a juror that he is akin to a member of the corporation. 1 *Saund.* 344.

(A. d. 4) Challenge peremptory in Criminal Cases. 21 Vin. 253.  
How many.

1. **S**OME statutes, which take away the benefit of clergy from felons, exclude those from their clergy who peremptorily challenge more than twenty, whereby they are liable to judgment of death. See *stats.* 22 *H. 8. c. 14.* 28 *H. 8. c. 1.* 1 *Ed. 6. c. 12. f. 11.* 3 & 4 *W. & M. c. 9.* But it is now settled that if the offender be within the benefit of clergy, the challenge shall be over-ruled, and the party put upon his trial. 2 *Hawk. P. C.* c. 43.

2. If a sheriff return a jury to try an indictment in which he is prosecutor, it is good cause to challenge the jury. *Sheppard's case, Cas. in Cr. Law,* 119.

3. On issue joined on the replication of *nul tiel record* to a counterplea of felony, the prisoner may challenge any of the jurors before they are sworn. *Cas. in Cr. Law,* 450.

4. It hath been allowed a good cause of challenge, on the part of the prisoner, that the juror hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like. 2 *Hawk. P. C.* 418.

[ D ]

25 Vin. 2.

## Justices.

BY stat. 1 Geo. 3. c. 23. judges commissioners continue during good behaviour, notwithstanding the demise of the king; but they may be removed on address of both houses of parliament; and their salaries shall be paid as long as their commissions continue; and, on the demise of the crown, they shall be paid out of the duties granted for the civil list till further provision, and then out of the monies applicable to such uses.

25 Vin. 13.

(F) Of the Warrants, and the Form, &c. of them.  
In general.

1. IN the case of an act of parliament, it is said that if the act directeth that a justice shall grant a warrant, and doth not say to whom it shall be directed, by consequence of law, it must be directed to the constable; and it cannot be directed to the sheriff, unless such power is given in the act. 2 *Ld. Raym.* 1192.

2. A warrant under the hand of the justice is sufficient, without being under seal, unless particularly required by act of parliament. *Bull. Ni. Pri.* 83.

3. A warrant to apprehend *all persons* guilty of a crime therein specified, will not justify the officer who acts under it. 3 *Hawk. P. C.*, b. 2. c. 13. p. 177.

4. In November 1762, the Earl of Halifax, Secretary of State, issued a warrant "to search for *John Entick*, the author, or one "concerned in writing the *Monitor*." The messenger seized Mr. *Entick* and his papers. On trespass, the jurors found a special verdict, and in *Mich. 6 G. 3.* Lord Camden delivered the judgment of the court, That a warrant to seize and carry away *papers* in the case of a seditious libel, is illegal and void. His Lordship said, that warrants to search for stolen goods had crept into the law by imperceptible practice; that it is the only case of the kind to be met with, and that the law proceeds in it with great caution. For, 1st, there must be a full charge upon oath of the theft committed; 2d, the owner must swear that the goods are lodged in such a place; 3d, he must attend at the execution of the warrant, to shew them to the officer, who must see that they answer the description. And, lastly, the owner must abide the event at his peril; for if the goods are not found, *he* is a trespasser, and the officer, being an innocent person, will be always a ready and convenient witness against him. 11 *State Trials*, 321. Vide also 2 *Hale*, 113. 151.

(G) Warrants executed, how.

15 Vin. 14.

1. *BLATCHER v. Kemp, Maidstone Summer Assizes 1781.*

This was an action of trespass for entering the plaintiff's house. The defendant had acted under a warrant from a justice of peace to search for nets; the warrant, on being produced, was directed to "The constable of *Shipborne*, to *Samuel Carter*, and "to all other officers of the peace in the county of *Kent*." Evidence was given that the defendant was boroughholder of the hundred of *Little Peckham*, which adjoined to the hundred of *Shipborne*, in which the plaintiff's house was situated. *Per Lord Mansfield*. No constable can execute a warrant out of his district; it is certainly to be taken *reddendo singula singulis*. This warrant is directed "To the constable of *Shipborne*, to *Samuel Carter*, and to all other peace officers:" the defendant is neither constable of *Shipborne*, nor *Samuel Carter*, and the general direction is to be taken to each within his district. Therefore, as the warrant was not directed to the defendant, he cannot justify under it, and the plaintiff must have a verdict for 1s. *Vide 1 H. Bl. 15. (notis.)*

2. A warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction) will, by 24 G. 2. c. 44., at all events, indemnify the officer who executes it ministerially.

3. The person to whom a warrant is directed, if it be within the jurisdiction of the justice granting it, may lawfully execute it. *3 Hawk. p. 176. f. 11.*

4. A bailiff or constable, if they be sworn and commonly known to be officers, and act within their own precinct, need not shew their warrant to the party, notwithstanding he demand the sight of it; but these, and all other persons whatsoever, making an arrest, ought to acquaint the party with the substance of their warrants; and all private persons to whom such warrants shall be directed, and even officers, if they be not sworn and commonly known, and even these, if they act out of their own precincts, must shew their warrants, if demanded. And therefore it is enacted by 27 G. 2. c. 20. that in all cases where any justice of the peace is required or empowered by any statute to issue a warrant of distress for the levying any penalty inflicted, or sum of money thereby directed to be paid, "the officer executing such warrant, if required, shall shew the same to the persons whose goods and chattels are distrained, and shall suffer a copy thereof to be taken."

*Vide also*  
24 Geo. 2.  
c. 44.

5. The execution of a warrant must be pursuant to the directions of it. Therefore, where a warrant was directed to the officer, "to take up a disorderly woman," and he took up a woman who was not so, the arrest was held to be illegal, and the officer liable to an



action for the injury. *Dawson v. Clarke*, *Norwich Summer Assizes* 1761, cited 3 *Hawk.* 182.

6. So also, where a warrant was directed by a secretary of state to the king's messengers "to take up the author, printer, or publisher of a libel," and the messengers took up a person who was neither author, printer, nor publisher, it was determined to be unjustifiable, and the messengers liable to an action of false imprisonment; for in neither of the cases had the officers acted in obedience to their warrants. *Money v. Leach*, 8 Nov. 1765, 11 *State Trials*, 312.

15 Vin. 15.

### (H) Of their taking Bail.

1. **BY** 1 & 2 Ph. & M. c. 13., justices of peace shall not admit to bail persons forbidden to be replevied or bailed by *Stat. Westm. the first*, c. 15., on pain of being fined by the judge of assizes.

2. *Rex v. Clarke Esq.* He, as justice of peace, committed a man on suspicion of stealing a mare, and bound over the owner to prosecute. Afterwards, upon examining two other persons, he admitted the party to bail. The prosecutor appeared at the assizes, and found a bill; but the party accused did not appear. And the court granted an information against the justice, declaring they should not have bailed the man themselves. 2 *Str.* 1216.

3. A commitment by a justice of peace for a time certain, as for 14 days, under the vagrant act, is a commitment in execution, and the party is not entitled to be bailed: and if another magistrate, on illegal and corrupt motives, discharge a person so committed, the court will grant an information against him. *R. v. Brooke*, 2 *T. R.* 190.

4. If a justice of peace *denies*, *refuses*, or *obstructs* bail, where it ought to be granted; for such conduct he is liable to an action on the case. 2 *Hawk. P. C.* 90. *Hale P. C.* 97.

15 Vin. 17.

### (L) Punishable. In what Cases.

1. **WHEREVER** magistrates act uprightly, though they may mistake the law, no information will be granted against them. *Per cur. Rex v. Jackson*, 1 *T. R.* 653.

2. But if they act improperly knowingly, information shall be granted; as in the case of *R. v. Holland and another*, 27 *G. 3.* 1 *T. R.* 692. and *R. v. Filewood and another*, *E.* 26 *G. 3.*; where, for granting an ale licence, previously refused by other justices, upon good grounds, informations were granted.

See *Lovelace v. Carry*, 7 *T. R.* 631. and *Briggs v. Evelyn*, 2 *H. Bl.* 314.

3. By 24 *G. 2. c. 44. s. 1.* it is enacted, that no action shall be brought against, or any process served on, any justice for any thing done in the execution of his office, until a month's previous notice has been given,

4. And

4. And unless it is proved upon the trial that such notice was given, the justice shall have a verdict and costs. *Sett.* 3.

5. And the justice may, at any time within one month after such notice, tender amends to the party complaining, or to his attorney; and if the same is not accepted, he may plead such tender in bar to the action, together with the plea of not guilty, and any other plea with leave of the court; and if upon issue joined the jury shall find the amends tendered to have been sufficient, they shall give a verdict for the defendant. *Sett.* 2.

6. And if he neglect to tender amends he may, by leave of the court, before issue joined, pay into court such sum as he shall see fit, whereupon such proceeding and judgment shall be had, as in other actions where the defendant is allowed to pay money into court. *Sett.* 4.

7. And no action shall be brought against any justice for any thing done in the execution of his office, unless commenced within six months after the act committed. *Sett.* 8.

8. Where the plaintiff in such action against a justice shall obtain a verdict, and the judge shall, in open court, certify on the back of the record that the injury for which such action was brought was wilfully and maliciously committed, the plaintiff shall have double costs. *Sett.* 7.

9. If a justice will not, on complaint to him made, execute his office, or shall misbehave in his office, the party grieved may move the court of King's Bench for an information, and afterwards may apply to the court of Chancery to put him out of the commission. *Ex parte Rock*, 2 *Atk.* 2.

10. But the most usual way of compelling them to execute their office in any case is by writ of *Mandamus* out of the King's Bench.

11. In actions brought against justices (for misdemeanor in the execution of their office) they are obliged to shew the regularity of their convictions; and the informations laid before them, upon which their convictions are grounded, must be produced and proved in court. 1 *Seff. Cas.* 372. *Hill v. Bateman*, 12 *G.* 1.

12. An information was moved for against the defendant for assaulting and beating the mayor of *Yarmouth*, being a justice of the peace, in the execution of his office. On shewing cause, the question was, whether the defendant could justify, the mayor having struck him first? By Lord *Hardwicke* C. J. He may justify it; for though a magistrate is protected by the law whilst he is in the execution of his office, yet in this instance he has forfeited that protection by beginning a breach of the peace himself. *Rex v. Symonds*, *Cas. temp. Hardw.* 240.

[ G ]

## Justification.

35 Via. 37. (A) Who may justify the detaining of a Thing, till Satisfaction.

1. A Person may justify detaining goods, or any things of value, 1st, where there is an express contract to that effect; and, 2d, where it is implied, either from the usage of trade, or the manner of dealing between the parties. 4 Burr. 2221.

2. As, a factor may detain goods consigned to him, not merely for what is due for those goods, but for the balance of a general account. *Krutzer v. Wilcox*, 2 Burr. 936.

3. In the case of *manufacturers*, their right to detain goods entrusted to them to manufacture, extends only to the work done by them to the goods, unless an express usage of trade is proved to the contrary. *Esq. N. P. Cas.* 96. 109.

4. A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him, he applies it to the discount of such of the bills as happen to be nearest in value to the sum advanced, but without any special agreement to that effect. This does invalidate the banker's general right to retain all the other bills in his hands, in order to secure his general balance. *Davis v. Bousher*, 34 G. 3. 5 T. R. 488.

5. An agreement entered into by a number of dyers, pressers, &c. at a public meeting, that they would not receive any more goods to be dyed but on condition that they should respectively have power to detain those goods for their general balance, is good in law; and any one who, after notice of it, delivers goods to either of these persons, must be considered as having assented to those terms, and cannot demand his goods until he has paid the balance of his general account. *Kirkman v. Shawcross*, M. 35 G. 3. 6 T. R. 14.

6. A dyer (not acting as a factor, but merely as a manufacturer) cannot justify detaining goods delivered to him to dye, for other debts, but for the dyeing those goods only. *Green v. Farmer*, 4 Burr. 2214. A packer, being in the nature of a factor, may. *Ib.*

See further on this subject the doctrine of *Lien*, as laid down in the different cases collected in *Com. Dig.* 4. tit. *Merchant*; and 2 *Esq. N. P.* 582. *et seq.*

## Land.

### (A) *Where Land shall be taken as Money, or Money <sup>15 Vin. 37.</sup> as Land.*

1. **M**ONEY to be laid out in land is uniformly treated as land.  
<sup>1 Atk. 11. 1749. Collett v. Collett.</sup>

2. Where a sum of money is given by the will of a testator to be laid out in the purchase of lands, or of lands in a particular county, and, after they are bought, to be settled on such and such persons: if a bill be brought, the constant course is to direct a purchase, and the produce of the money to go as the land itself, till purchased. <sup>2 Atk. 369. July 1742. Earl of Coventry v. Coventry.</sup>—See also *Oldham v. Hughes*, <sup>2 Atk. 452.</sup> and *Beechm v. Trafford*, <sup>3 Atk. 440. 447.</sup>

3. So, if there were directions in a will to purchase a particular estate, which is swallowed up by an inundation (as happened in *Essex*), the money so devised shall not go to the executor, but in such manner as the rents and profits of the estate directed to be purchased would go. *Ibid.*

4. A proviso in a settlement that 1000*l.* shall and may be laid out by the trustees in the purchase of lands. The court was of opinion, that where there is a power to lay out money in land under some particular circumstances, but the original intention was it should be considered as money, if it be not actually vested in land, it shall not be considered as land and go to the heir. <sup>3 Atk. 212. Stamp v. Miller. Feb. 1744.</sup>

5. Upon a marriage between *Richard Bramble* and *Mary Timbrell*, the said *Richard Bramble*, by articles previous to his marriage, covenanted to lay out 2000*l.* in the purchase of lands, and to settle the same on himself for life, and after his decease, to *Mary* his intended wife for life; and after both their deceases, to trustees to sell, and the money arising by such sale to divide amongst the children of the marriage, to sons at 21, daughters at 21 or marriage, *provided that no sale be made till one of the shares become payable.* The purchase was made accordingly, after *Elizabeth*, the surviving child, died unmarried, but had attained the age of 21; the absolute proprietor of these lands, *Elizabeth*, having taken them as lands in her lifetime, and done acts to shew she intended they should be considered as real estates, they must be held as such, and go to the heir. <sup>3 Atk. 680. March 1747. Crabtree v. Bramble.</sup>

6. Money, by marriage articles to be laid out in land, to the use of the husband and wife for life, then to the children as they should

should appoint: in default of appointment, equally; if but one, to that one in tail, reversion to the husband in fee. There was but one daughter of the marriage; the trustee pays it to her and her husband; she not being *sui juris*, nor separately examined: the payment was not sufficient to make it considered as money, and the sister of the half blood may claim the reversion in fee from the father; but the husband of the other sister, who was tenant in tail, will be tenant by the curtesy. 1 *Ves.* 174. 1748. *Cunningham v. Moody*.

7. Testator gave all his real estates, to sell and dispose of the whole, with his personal estate, blending them for payment of debts, &c. He gave several legacies, amongst which was a legacy of 1200*l.* part whereof was to be laid out in the purchase of freehold lands for charitable uses. Lord *Hardwicke* held that the 1200*l.* was personal estate. 1 *Ves.* 321. 1749. *Durour v. Motteux*.

8. Where the guardian of an infant, tenant in tail, cuts down timber, the money arising from it shall be personal estate of the infant; but if the infant had the fee, it shall be considered as real estate. *Amb.* 370. 1759. *Tullit v. Tullit*.

9. An infant entitled in remainder, under a reference to the Master, and order of court, purchases her mother's jointure, and, having attained 21, receives one year's rent, and dies; held the purchase was to be considered as real estate, though made during infancy. *Amb.* 417. 1762. *Inwood v. Twyne*.

10. *W. W.* conveyed estates in fee to trustees, to sell, pay debts, &c., and afterwards to apply the residue as follows: To raise a sum, and pay interest to *D.* till marriage, and pay the principal to *D.* within 12 months after marriage, then to divide the residue in shares amongst the plaintiffs. By will he gave out of other lands a charge for another daughter, the residue to the plaintiffs. *D.* died unmarried; the 1500*l.* resulted to the settlor as a resulting trust, but in his hands was personal estate, and passed as part of the residue. 1 *Bro. Ch. Rep.* 86. 1780. *Hewitt v. Wright*.

11. Money bequeathed to be laid out in land, the trustee, being entitled to the money, lays part of it out in a purchase, but afterwards discharges that estate of the trust; and, making his will, gives generally (without taking notice of his money) his real and personal estate to *A.*, who afterwards makes his will, and gives his real estate to *B.*, and his personal estate to *C.* The trust-money passes as personal estate, the court being of opinion, under the circumstances, that the money continued money. 1 *Bro. Ch. Rep.* 224. 1778. *Sir Wm. Pultney and others v. Earl of Darlington*.

12. Where a real estate is ordered to be sold, and is blended with the personal property, it becomes personalty, and shall go accordingly. 1 *Bro.* 497. 1779. *Fletcher v. Ashburner*.

13. Testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies paid, and the residue to certain legatees, in the proportion of their legacies; two of the

the residuary legatees died, living the testator. These shares were lapsed, and so far as they are constituted of personal estate, shall go to the person next of kin; and so far as they are constituted of the real estate, to the heir at law. 1 Bro. 503. 1779. *Ackroyd v. Smithson*.

*Mr. Ogle made his will in 1744, and gave his real estate to trustees to sell, and vest the money in stock, and pay the interest to his wife during her widowhood, and after her death or marriage, the principal to his two daughters equally, except that the eldest was to have 1000*l.* more than the other: he gave the residue of his personal estate in the same way; and afterwards executed a conveyance in trust to sell for the payment of his debts, which was held a revocation pro tanto only, and part was sold. One of the daughters died in Mr. Ogle's life. The court decreed the residue of the estate to be sold, and that the produce should be considered as Mr. Ogle's personal estate. Cited 1 Bro. 514. Ogle v. Cook. 1748.—Devise of real and personal estate to trustees, in trust out of the personal estate, and by sale of a sufficient part of the real to pay debts; the surplus, after payment of debts, to A. A suit was instituted for the payment of debts, and the real estates decreed to be sold: part was sold; and afterwards A. died, leaving a son and daughter; the cause was revived against the son, and it being apprehended that sufficient was not sold to pay the debts, a further part of the real estate was sold under the order of the court. It afterwards appeared that the money produced by the first sale was sufficient to pay the debts.—Question, whether the heir or personal representatives should have this money? Lord Camden Chm. decided in favour of the next of kin. Flanagan v. Flanagan, 1768. cited 1 Bro. 498. Fletcher v. Ashburner.*

14. Where money is directed to be laid out in land, an *infant* cannot elect to take it as money. 2 Bro. Ch. Rep. 56. 1786. *Carr v. Ellison*.—See *Earlom v. Saunders*, Amb. 242.

15. Testator directs the rest and residue of his real and personal estates to be sold by trustees, and to pay annuities; and then to pay the produce to A. for life. One of the trustees (who are executors) has a legacy. This does not give them a beneficial interest: and so much of the residue as arises from the real, is a resulting trust for the heir, the rest for the next of kin. 2 Bro. Ch. Rep. 589. 1789. *Robinson v. Taylor*.

16. *Frances Hutchefon* having an estate which came to her *ex parte materna*, on her marriage, conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs: by will she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life; then (after the deduction of 3500*l.* to uses which vested in the plaintiff A. J., and after payment of 1000*l.* to G. P.) to pay the residue of the purchase-money to the three defendants H. By codicil she gave the plaintiff, her husband, a power of appointing 3500*l.* in case A. J. should marry without his consent. G. P. died, living the testatrix, before the codicil made; but *Frances Hutchefon*, in the codicil, took no notice thereof. The 1000*l.* is real estate, and shall not go to the executors of G. P., (though given to her executors,) nor to the personal representative of the testatrix, nor yet to the residuary legatee of the purchase-money, but to the heir at law *ex parte materna*, the side from whence the estate came. 3 Bro. Ch. Rep. 128. July 1790. *Hutchefon v. Hammond*.

17. Testator ordered his real estate to be sold, and the residue to be laid out in the funds, to remain for 10 years, and at the end thereof gave the same to his next of kin; the next of kin at the time

time of the death would be entitled to take; and the testator having but one brother, who was such next of kin, and who died within the 10 years, it is lapsed, and so much as was produced by the real estate reverts to the heir of testator, and so much as was produced by the personalities to the representatives of the brother.

3 Bro. 353. 1791. *Spink v. Lewis and others.*

18. "After all my just debts are paid, I give and bequeath unto my only sister, *Eleanor Dearn*, the annual produce of 2000 guineas, to be laid out in a piece of land, for a place of retirement, to be for ever entailed on her issue, the annual produce of such purchase, to be yearly and equally divided among her issue, males and females, for the education, maintenance, and support of them." The testator had no real estate at his death, and at the time of making his will *Eleanor Dearn* had three children, *Elizabeth*, who afterwards married the plaintiff, and the defendants, *Anna Maria*, and *Thomas*. *Eleanor* died, and *Elizabeth* married the plaintiff, and had one child, who soon after died; the lands were never purchased; bill by the husband after his wife's death, insisting that the land, if purchased, ought to be settled on *Elizabeth Dearn* for her life, remainder to her sons and daughters in tail, and that he having married one of the daughters and had issue, is entitled as tenant by the curtesy to her third; which was decreed accordingly. 3 Bro. Ch. Rep. 410. Dec. 1791. *Griffith v. Harrison and others.*

19. Personal to be laid out in land, but lent on mortgage instead, considered as land, having been always out in trustees, and the uses never united with the possession; and passed by such general words in a will as would pass lands. 1 Ves. jun. 201. 1790. *Rasbley v. Masters.*

20. Timber on a lunatic's estate, cut under order of court, sold, and the produce paid into the Bank on account of the lunatic; after his death, on petition by his heir for the money, the Chancellor was of opinion, that the court may do it for the lunatic's benefit, but only on pressing occasions: that when property is converted, equity will recal it for the representative, if done by breach of trust, not if by accident, the court, or the tort of a stranger; but on account of its consequences, and difficulty of reversing an order made on petition, refused to give it either representative, without a bill. 1 Ves. jun. 453. 1792. *Ex parte Bromfield.*

21. There is no equity between the real and personal representative after the death of a lunatic to have property, which was altered by the court, restored; therefore the produce of timber on the lunatic's estate, cut and sold by order, on report that it would be for his benefit, is personal assets. 2 Ves. 69. 1793. *Oxenden v. Lord Compton.*

22. A representative must take his interest, as fortune has directed it, and has no equity to vary it; therefore, where a lunatic dies entitled to an estate, and also to a charge upon it, the heir takes it discharged, and a trust term to secure a charge makes

no difference; for it remains inert, unless required to be executed for proper purposes. The trustees have no discretion. *Ibid.* 261.

23. Testatrix directed her real estate to be sold, and all her estate to be converted into money for the purposes of her will: the will was satisfied without touching the real; here is no equity for the next of kin. 2 *Ves. jun.* 271. 1793. *Chitty v. Parker.*

24. Personal estate, under marriage articles, to be invested in land, or Government or other securities; the court finding it in its original state, considers it as personal; but part having been laid out in land, which was settled, and afterwards sold, and the produce invested in stock, till a proper purchase of land could be found, to be settled to the same uses, that was considered as land. 2 *Ves. jun.* 336. June 1794. *Bristowe v. Ward.*

25. Where land is directed to be sold, and the produce to be applied as aftermentioned; if no disposition be made, the heir shall take. *Per* Master of the Rolls. 2 *Ves. jun.* 447. 1794. *Sheldon v. Barnes.*

26. *John Reeve* devised several real estates to *Wm. Collins* and his heirs, in trust to sell the same, and he declared that the monies to arise by such sale should be considered as part of his personal estate, and thereout, and out of his personal estate, he gave legacies to his next of kin, and heir at law, and others. He gave other estates to be sold, and the produce to be considered from thenceforth as other part of his personal estate, and to be disposed of in manner following: He then gave legacies and some estates specifically, and other legacies out of his said trust-monies and personal estate, and gave his executor 1000*l.* to be disposed of according to any instructions he might leave in writing, and gave all the residue of his goods and chattels, personal estate and effects whatsoever, subject to debts, legacies, &c. No instructions being found, the heir is entitled to the 1000*l.* 2 *Ves. jun.* 683. 1794. *Collins v. Wakeman.*

27. By settlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of the grantor's term, in trust to raise an annuity for the lives of the wife and her mother, and the survivor: then reciting, that the remainder of the term might expire in the life of the wife or her children; therefore, to make a provision for her and her children by her then or any future husband, the trustees should be possessed of the said tolls for the remainder of the term, upon trust to raise, after the deaths of the grantor and the mother of the wife, annually 100*l.* to be placed out in the purchase of freehold lands or hereditaments, or leasehold estates for two or three lives, as often as a competent sum should be raised for that purpose; and, until convenient purchases should offer, to be invested in Government securities upon trust, in case the wife should survive the term, to pay the rents, issues, and profits or interest money towards the support and maintenance of such child and children of her, as should be living at her death, till the youngest should be 21; and then to be possessed of such estates so to be purchased, or



or of the money arising from the annuity, not placed out in one or more purchase or purchases, to the use of such child and children in such share and proportions, payable at 21, as the survivor of the husband and wife should by will or deed direct, limit, and appoint; in default thereof, to the use of all such children, equally to be divided, at their respective ages of 21; but if he should die without leaving any child or children, or all should die under 21, then to the use of the grantor, his heirs, executors, administrators, and assigns; and after paying the said annuities to be possessed of all the surplus money arising from the said tolls during the remainder of the term for the use of the grantor, his executors, &c. from the death of the grantor, who survived the wife's mother: The trustees received 100*l.* a-year, and laid out in stock the sums received and the produce. One son was the only issue. He attained 21 in the life of his mother, and survived her. The court would not invest the fund in land: but held it, with the accumulations from the death of the grantor, and the future payments, a vested interest in the son at 21, and as personal estate belonging to his administrator. 3 *Ves. jun.* 41. Feb. 1796. *Swann v. Fonnereau*.

28. A real estate devised to be sold, and the produce disposed of with the personal estate, with a power to direct the fund to be laid out in land; no such direction having been given, it was held personal property. 3 *Ves. jun.* 450. July 1797. *Maberty v. Strode*.

29. If an estate be declared charged with legacies, which fail, the devisee, and not the heir, shall have the benefit of it. 4 *Ves. jun.* 811. July 1799. *Rennell v. Abbott*.

30. There is no equity between the heir, or the devisee and the personal representative to convert property from the state in which it is found at the time when the death takes place. 5 *Ves. jun.* 303. 1800. *Attorney-General v. Bowyer*.

31. To convert real or personal property, from the state in which it is found at the death, as between the real and personal representatives, the character of land or money must, by the trust, covenant, &c. be imperatively and definitively affixed to it. 5 *Ves. jun.* 388. May 1800. *Whelpdale v. Partridge*.

15 Vin. 40.

(B) *Where Money being ordered to be laid out in Land, and settled, Chancery will decree the Payment, or enforce the laying it out.*

1. BY articles previous to the marriage of *A. G.* with the plaintiff, reciting her portion to be 2800*l.*, and that the defendant, as an advancement of his brother, &c. had agreed to pay 4000*l.* It was agreed to be laid out in the purchase of lands, or in some church, college, or other renewable lease, to be settled to the same uses as the freehold and leasehold estates, which *A. G.* was seised and possessed of, are appointed to be settled; the last limitation

limitation to *A. G.* and his heirs. 2800*l.* and 4000*l.* were never laid out in land, but remained in money to *A. G.*'s death. He, by will, devised all his freehold, leasehold, and copyhold estates, lying in *Islington* and *Hampshire*, or elsewhere, to the plaintiff for life, and after her death to the defendant and his heirs; and his personal estate, after paying his debts and legacies, he gave to the plaintiff, and made her and the defendant executors. The 2800*l.* and the 4000*l.* were ordered to be laid out in the purchase of lands of inheritance, or in church and leasehold lands. The court being of opinion that if there had been only a general devise of his lands this money would certainly have passed. 3 *Atk.* 254. 1745. *Guidot v. Guidot.*

2. Testator contracts for a particular estate, but dies before the purchase is completed; afterwards, from the state of his affairs, the contract was dissolved; yet the purchase-money shall not sink into his personal estate, but be laid out to the same uses as he had devised the land contracted for. 4 *Bro. Ch. Rep.* 31. 1792. *Whittaker v. Whittaker.*

3. Testator directed money to be laid out in manors, lands, tenements, tithes, and hereditaments, or very long terms, with limitations applicable to real estates: the money not having been laid out, the crown, on failure of heirs, has no equity against the next of kin to have it laid out in real estate, in order to claim by escheat; the devisees, on becoming absolutely entitled, have the option given by the will: and a deed of appointment by one, who was a *feme covert*, was held sufficient indication of her intention, that it should continue personal against her heir claiming it as ineffectually disposed of for want of her examination. 2 *Ves. jun.* 170. 1793. *Walker v. Denne.*

4. Money bequeathed to *A.*, to remain at interest, or to be by him laid out in real estates, to go with other estates devised. *A.*, being tenant in tail of the real estates, and being entitled under an assignment of the money from the reversioner, subject to contingent limitations, disposed of the money by will. The court inclined in favour of the disposition, upon the ground that *A.* might have called for the money as absolute owner; but it was established upon the option to continue it personal estate. 3 *Ves. jun.* 583. 1798. *Amler v. Amler.*

5. Testator devised a real estate to *A.* in tail male; remainder over; and gave a sum of money in trust to be laid out in land, to be settled to the same uses: by codicil he devised the same real estates to *B.* and his heirs: and gave everything he had given by his will to *A.* in as ample a manner to *B.* *B.* is tenant in fee of the real estate, and is entitled to have the money paid him. 4 *Ves. jun.* 101. July 1798. *Youngs v. Combs.*

## Latitat.

25 Vin. 45.

(A) Latitat. What it is; and the Intent of it.

1. **L**ATITAT is the true commencement of actions brought by bill of *Middlesex*, within the meaning of the statute of limitations. *Johnson and another, Assignees, &c. v. Smith. 2 Burr. 950.*

2. Though the *latitat* is holden to save the bar within the equity and reason of the statute, yet it must be taken out *with intent to declare in that action*, and must be *continued* to the filing of the bill. *Ib. 961.*

3. Where the true time of suing it out is material, it may be shewn, notwithstanding the *teste*. *Ib. 950 to 969.*

4. The *teste* of a *latitat* sued out in vacation must be of the preceding term. *Ib. 964.*

5. A *latitat* is a good commencement of a penal action, *ib.*; and may bear date *before* the cause of action, if really prosecuted after. *Ib. 967.*

6. By the general rule and course of the *King's Bench*, the *bill* is the commencement of the *suit*; and the *latitat*, except where it is replied to the statute of limitations, or to avoid a tender, or where it is given in evidence to support a penal action in point of time is considered but as *process*. *Foller v. Bonner, 2 Cowp. 454.* Therefore the time of suing it out, except in the cases above mentioned, is *immaterial*. *Ib.*

7. But in these excepted cases, the time of suing out a *latitat* is material. As where, upon an action brought upon the stat. 8 Geo. 1. c. 19. (which directs all prosecutions upon it to be brought *before the end of the next term* after the offence committed) it was manifest upon the face of the declaration that it was out of time, the memorandum being of *Trinity* term, and the declaration stating that the defendant, after the first day of *Hilary* term, and before the exhibiting the plaintiff's bill, *viz.* on the 27th of *January*; kept a lurcher; yet, upon proof at the trial that the *latitat* was sued out within time, it was holden sufficient. *Ib.*

8. In all such cases the defendant is entitled, as well as the plaintiff, to shew the true time of the *latitat* issuing. *Ib.*

(A) *Levant and Couchant.*

[ G ]

1. ANY cattle *levant and couchant* may be distrained for rent-service, or a rent charge. *Kempe v. Crews*, 1 *Ld. Raym.* 167.
2. The cattle of a stranger *levant and couchant* thereon are issues out of his estate, as standing in the mortgagee's place. *Britton v. Cole*, 1 *Comyns's Rep.* §2.

*Lien.*

(A) What is a Lien on the Lands.

15 *Via.* 96.

1. A Husband has a mortgage on his estate; the wife joins with him in charging her own; if she survives, her estate shall be looked upon only as a pledge, and she is entitled to be satisfied out of his estate, as standing in the mortgagee's place. 2 *Ask.* 384. 1742. *Partridge v. Powlet.*
2. A decree is not equal to a judgment to affect lands, though it is in a course of administration. 1 *Ves.* 496. 1750. *Astley v. Powis.*
3. *George Stephenson* died intestate, leaving several co-heirs, of which the plaintiff was one; and a partition being afterwards made, an estate called *Bonside*, and other lands, were allotted to the plaintiff, and by her direction conveyed to her and her son, *John Fawell*, their heirs and assigns. On the 29th July 1768, the plaintiff conveyed her interest to her son and his heirs, and took his bond for the consideration-money. *John Fawell* afterwards became insolvent, and in 1770, conveyed this and his other estates to certain persons, in trust for themselves and his other creditors. The plaintiff having received 280*l.* only in part discharge of the bond, filed her bill against the assignees to be paid the remainder out of the money to arise by sale of the estate; but the court was of opinion that the vendor having parted with his estate, and taken a security for the consideration, had no lien upon the estate against the creditors of the purchaser. *Amb.* 724. 14th June 1773. *Fawell v. Heelis and others.* *Dickins's Rep.* 485. S. C.

4. Where, upon a sale of lands, bonds are taken for the purchase-money, which is not paid; *quare* whether the vendor has a lien on the lands? 1 *Bro. Ch. Rep.* 420. 1784. *Blackburn v. Gregson.*

5. *A.* purchases an estate of *B.*, without notice of rent-charges, &c. the vendor covenanting that there were no incumbrances: the purchase-money is laid out in the funds, and *B.* afterwards sells the dividends for his life (secured by letter of attorney) to *C.* who has no notice. *A.* is evicted by the grantee of the rent-charge; he has no lien on the funds purchased, against *C.* 2 *Bro.* 282. 1787. *Cator v. Earl of Pembroke and others.* 1 *Bro.* 301. *S. C.*

6. An assignment of rents and profits is an odd way of conveying; but it amounts to an equitable lien; and would entitle the assignee to come into equity and insist upon a mortgage: an assignment of deeds alone is sufficient for that purpose: and in this case there is a covenant for further assurance. 1 *Ves. jun.* 161. 1790. *Ex parte Willis.*

7. In this case it was said *per* Lord Chancellor, that an equitable lien was an equitable obligation to do according to conscience, and that a devise of it is good in equity. 1 *Ves. jun.* 251. 1790. *Perry v. Philips.*

8. An administratrix cannot be allowed payments made after a decree to account; but she stands in the place of the creditors she has paid. 2 *Ves. jun.* 518. 1794. *Jones v. Jukes.*

9. The devisee alien; the land is not subject to the specialty debts of the deviser. 2 *Anstr.* 506. 35 *G. 3.* *Matthews v. Jones.*

### (B) What Agreement is a Lien on the Lands.

1. *M.* Agreed to purchase an estate of the plaintiffs for 1200*l.* but died before he paid the whole of the purchase-money: and by his will, after giving 800*l.* legacy to his sister, devises the estate purchased, and all his personal estate, to *J. K.*, and makes him executor: *J. K.* commits a *devastavit* of the personal estate, and dies, and the personal estate descends on *B. K.* his son. The court, to give the legatee a chance of being paid her legacy out of the personal estate, directed the plaintiff to take his satisfaction out of the purchased estate for the remainder of the purchase-money. 3 *Atk.* 272. Feb. 1745. *Pollenfen v. Moore.*

2. Where a conveyance is made of land, and the money not paid, as against the vendee, his heir, or any claiming under him as purchaser, with notice of the equity; the land may be resorted to. Said *per* Lord Chancellor. 2 *Ves.* 622. July 1755. *Walker v. Preswick.*

3. A lease having been pledged by a person, (who afterwards became a bankrupt,) to the plaintiff as a security for a sum of money lent to the bankrupt, the pledgee brought his bill for a sale of the leasehold estate, which was decreed. 1 *Bro. Ch. Rep.* 269. 1783. *Ruffel v. Ruffel.*

*Per* Lord Chancellor. Where there is an incomplete agreement for a mortgage, the court, after the death of the party, has given a specific lien. 2 *Ves. jun.* 582. *Burn v. Burn.* 1798.

## Libel.

[G]

## (A) What is a Libel.

25 Vin. 84.

1. A Libellous letter addressed to the party himself, though it may be the object of an indictment, as tending to incite the plaintiff to a breach of the peace, is not actionable. To entitle the party to an action it must be addressed to a third person.

2 *Esp. Rep.* 625.

2. It is not a libel for the editor of a public newspaper to comment fairly on any place of public entertainment, or on any public performer. *Dibdin v. Swan*, 1 *Esp. Rep.* 28. *Aliter* if done falsely and maliciously. *Id.*

3. If a member of parliament publish his speech in the newspapers, and it contain charges of a slanderous nature against any individual, an information will lie against him for a libel. *Rex v. Lord Abingdon*, 1 *Esp. Rep.* 226.

4. A paragraph in one newspaper charging another with being vulgar or scurrilous, is not a libel. But if it assert of such other newspaper that it is low in circulation, as addressed to persons who may be disposed to advertise in it, it is a libel. *Heriot v. Stuart*, 1 *Esp. Rep.* 437.

5. A report in a newspaper of what passed in court in a cause, is not a libel. *Curry v. Walter*, 1 *Esp. Rep.* 456.

6. An obscene book is punishable as a libel. *Rex v. Curl*, 2 *Stra.* 789. 4 *Burr.* 2527.

7. To insert a paragraph in a newspaper of a tradesman, tending to discredit him in his business, is a libel for which he may maintain an action. *Harman v. Delany*, 2 *Stra.* 898.

8. If the contents of a libel are true, the court will not grant an information, but will leave it to the ordinary course of justice before a grand jury. *Rex v. Bickerton*, 1 *Stra.* 498.

9. Though a libel tend to a breach of the peace, yet it is not an actual breach of the peace; and therefore a member of parliament writing a seditious libel, is entitled to his privilege from being arrested for the same. *Rex v. Wilkes*, 2 *Wils.* 149.

As to when the prosecutor for a private libel must deny the charge

made in it upon oath, to induce the court to grant an information, and when he need not, vide *Rex v. Miles*, D. 181. 284. *Rex v. Haswell*, ib. 387. and the cases there cited. *Rex v. Pearce*, ib. 390 n. *Rex v. Webster*, 3 T. R. 388.

10. To print of any person that he is a swindler, is a libel and actionable. 1 T. R. 748.

11. Whatever tends to make a man ridiculous, or to hinder men from associating with him, is a libel. *Villers v. Monfley*, 2 *Wils.* 403. *Rex v. Benfield*, 2 *Burr.* 980.

12. Though the person upon whom the libel is written be dead, it is still a libel, and punishable as such. *Rex v. Topham*, 4 *T. R.* 126.

15 Vin. 89.

(D) What is the distinct Power of the Court, and of the Jury, as to Libels.

1. UPON information for printing and publishing a seditious libel, the jury found the defendant guilty of *printing and publishing ONLY*; whereupon a *ven. fac. de novo* was ordered. *Rex v. Woodfall*, 5 *Burr.* 2661.

2. By 32 *Geo. 3. c. 60.* on the trial of an indictment for a libel, the jury may give a general verdict upon the whole matter in issue, and shall not be required by the court to find the defendant guilty, merely on proof of the publication, and of the sense ascribed to it in the information; but the court shall give their opinion and direction on the matter in issue, as in other criminal cases; and the jury may find a special verdict; but defendants may move in arrest of judgment, as before passing this act.

3. On the trial of an indictment for a libel, the only questions for the consideration of the jury are the fact of the publishing, and the truth of the innuendoes, Whether the subject matter be or be not a libel is a question of law for the consideration of the court. *R. v. the Dean of St. Asaph, M.* 25 *G. 3.* 3 *T. R.* 428. *n.*, and *R. v. Withers*, 3 *T. R.* 428. (But see *stat. 32 G. 3. c. 60.* above cited, and the opinion of *Kenyon Ch. J.* in *R. v. Holt*, 5 *T. R.* 436.

15 Vin. 90.

(E) Pleadings.

1. UPON an information for writing and publishing a libel, of and concerning the king's government, and the employment of his troops, (setting forth the libel *verbatim*), the words "of and concerning" are a sufficient introduction of the matter contained in the libel, and a sufficient averment that it was written "of and concerning the king's government and the employment of his troops." *Rex v. Horne*, 2 *Cowp.* 672.

2. The gist of every charge of every libel, consists in the *person or matter*, of and concerning whom or which, the words are averred to be said or written. *Ib.*

3. All circumstances necessary to constitute the crime must be set out. *Ib.*

4. Where the writing is so clear as to amount of itself to a libel, all foreign circumstances introduced upon the record are unnecessary. *Ib.*

5. Where

5. Where the libel does not in itself contain the crime without *extrinsic* aid, such extrinsic matter must be put upon the record by *averments*. If *new* matter, by way of *introduction*; if matter of *explanation*, only by way of *innuendo*. *Ib.*

6. After verdict, in an action for a libel, the judgment was arrested, because it was not laid that the libel was of or concerning the plaintiff. *Lowfield v. Bancroft*, 2 *Stra.* 934.

7. The *publication* must be stated in the declaration; but it may be collected from the whole of it, and requires no technical form of words. 2 *Bl. Rep.* 1037.

8. In an action for a libel, written in a foreign language, the plaintiff must set forth the libel in the original; and if he only set out a translation of it, the court will arrest the judgment. *Zenobio v. Axtell*, 6 *T. R.* 162.

9. An indictment or information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is false. *Rex v. Burks*, 7 *T. R.* 4.

10. An indictment for publishing libellous matter, reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, to stir up the hatred of the king's subjects against them, cannot be supported. *Rex v. Topham*, 4 *T. R.* 126.

#### (F) Publication. What.

25 Vin. 92.

1. **E**VIDENCE of buying a *libel*, in the shop of a known common bookseller and publisher, (especially when it imports to be printed for him) is sufficient *prima facie* evidence (if believed, and not contradicted) to convict him of publishing it. *Rex v. Almon*, 5 *Burr.* 2687 to 2690.

2. Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper, under the stat. 29 *G. 3. c. 50. s. 10.*, and had occasionally applied at the stamp-office respecting the duties, is evidence that he is a publisher. *Rex v. Topham*, 4 *T. R.* 126.

### Licence.

[A]

#### (E) Countermandable.

25 Vin. 94.

**I**N general the same person who gives may revoke a licence; therefore where an incumbent is bound by deed to reside, absence by leave of the obligee ceases to excuse when the licence is countermanded. It is like a general licence to enter another's grounds, which may be countermanded at any time. *Bagshaw v. Boysley*, 4 *Term Rep.* 82.



## Limitation.

25 Vin. 99.

## (A) Time of Limitation.

1. IN ejectment for mines, plaintiff proving himself lord of the manor, and in possession of it, does not avoid the statute of limitations, if the defendant has been in possession of the mines 20 years; for they are distinct possessions, and may be different inheritances. *Rich v. Johnson*, M. 14 G. 2. 2 *Stra.* 1142.

2. By the stat. 4 *Ann.* 16. no entry or claim shall be sufficient unless an action be prosecuted within a year after.

3. To make length of possession a bar under these statutes, it must be a possession adverse to the title of the true owner, and not length of possession during a particular estate. *Cowp.* 218.

4. Particular times of limitation are frequently appointed by statute, different from those in common cases; as, in actions against justices of the peace, constables, headboroughs, &c. which, by 24 *Geo.* 2. c. 44. s. 8., must be commenced within six months; and in actions against officers of the excise or customs, &c. which, by 23 *Geo.* 3. c. 70. s. 34., must be commenced within three months after the act committed.

25 Vin. 106.

## (B) Prevented as to real Actions. By what Acts.

1. THE possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him co-tenant; nor, indeed, is refusal to pay of itself sufficient, without denying his title. But if upon demand by the co-tenant of his moiety, the other refuses to pay, and denies his title, saying, he claims the whole, and will not pay, and continues in possession, such possession is adverse and ouster enough. And in the same case it was held, that a jury might presume actual ouster from an undisturbed and quiet possession for a great length of time, *ss.* 36 years. *Per Lord Mansfield*, in *Fisher v. Prosser*, *Cowp.* 218. *Vide Espinasse*, 456. 1 *Atk.* 493. 1 *Bl. Rep.* 677. 2 *ib.* 690.

2. Whether the lord's right of entry for a forfeiture be not barred after 20 years by the statute of limitations, *Qu. Rex d. Warrant v. Hellier*, 3 *T. R.* 172.

(C) Prevented as to personal Actions. By what Acts. 25 Vin. 106.

1. **I**N *assumpsit* on a promissory note, and *non assumpsit infra sex annos* pleaded, on the trial it appeared that the defendant was surety in the note for J. S., and that six years were elapsed since the note was given, but that upon demand within the six years, the defendant said, "You know I had not any of the money myself; but I am willing to pay half of it." The court were of opinion that this promise took it out of the statute. *Buller's N. P.* 149.

2. In *assumpsit* on a joint and several promissory note, and the action was against one, who pleaded the statute of limitations; payment of interest by another of the drawers was held a sufficient acknowledgment to take it out of the statute as to all, and the plaintiff recovered. *Whitcomb v. Whiting, Dougl.* 629.

3. Where a joint and several promissory note was given by two in the year 1784, and one became bankrupt, the payee proved the note under his commission and received several dividends, the last of which was in the year 1793, a balance remaining unpaid, the present action was brought, and the defendant pleaded the statute of limitations. It was held that the payment of the dividend under the commission against one, took the debt out of the statute of limitations. *Jackson v. Fairbank, 2 H. Bl.* 340.

4. The slightest acknowledgment of a debt has been held sufficient to take a demand out of the statute; as to say, "Prove your debt and I will pay you;" or, "I am ready to account, but nothing is due to you." *Per Lord Mansfield, Cowp.* 548. *Yea v. Fouraker, 2 Burr.* 1099.

*24. Whether this can be fairly interpreted to be an acknowledgment of a debt, even in the slightest degree.*

5. Where to an action of *assumpsit*, and the statute of limitations pleaded, the plaintiff proved, that just after the bill had been delivered, the defendant met the plaintiff and said, "What an extravagant bill you have delivered to me." Lord *Kington* ruled this to be a sufficient acknowledgment of some money being due. *Lawrence v. Worrall, Peake's N. P.* 93.

6. A *latitat* sued out within six years shall be good to prevent the statute from running, though no bill of *Middlesex* preceding it is shewn. So a *capias* is good without an original. *Hollister v. Coulson, 1 Stra.* 550. *Metcalf v. Burrows, Bull. N. P.* 151.

7. Though the writ sued out has been *informal*, it shall yet be sufficient. *Leadbetter v. Markland, 2 Bl. Rep.* 1131. But where the process is impossible or a nullity, it shall not operate to take the demand out of the statute. *Green v. Revell, 2 Salk.* 421.

8. If the plaintiff has levied a plaint in *assumpsit* in an inferior court, it shall prevent the statute of limitations from attaching against him, if he aver in his replication above that it is for the same cause of action. *Story v. Athyns, 2 Stra.* 719.

9. And

9. And if an action has been so commenced in an inferior court, and the defendant removes it by *habeas corpus* to the King's Bench; though the six years have elapsed before the removal, yet the statute does not bar the action, if the commencement of it in the court below was within the time. *Gaiver v. James*. Trin. 14 G. 2. C. B. Bull. N. P. 151.

10. It is necessary that a suit should be continued; for though a writ has been sued out, yet if there have been no proceedings on it for six years, from the suing of it out to the time of declaring, the statute shall operate. *Lacon v. Lacon*, 2 Atk. 395.

11. And the continuances must be by regular process; for where to a plea of the statute of limitations, the plaintiff replied that he had sued out a bill of *Middlesex* in Mich. term 1785, which had been regularly continued to Mich. 1789, when he sued out an attachment of privilege for the same cause of action, to which the defendant appeared: to this there was a demurrer, when it was decided, that to keep the suit alive there must be a continuance of the original writ sued out; that here the first process was by bill of *Middlesex*, of which an attachment of privilege (being a writ of a different nature) could not be a continuance. And the defendant had judgment. *Smith v. Bower*, 3 T. R. 662.

12. A bill depending in Chancery almost six years is not such a demand as to take a debt out of the statute of limitations. *Anon.* H. 1736. 2 Atk. 1.

13. One of two makers of a joint promissory note having become a bankrupt, the payee receives a dividend under the commission on account of the note: this will prevent the other maker from availing himself of the statute of limitations in an action brought against him for the remainder of the money due on the note; the dividend having been received within six years before the action brought. *Jackson v. Fairbank*, 2 H. Bl. 340.

14. If there be a mutual account of any sort between the plaintiff and defendant, for any item of which credit has been given within six years, that is evidence of there being such an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute of limitations. *Catling v. Skoulding*, 6 T. R. 189.

25 Vin. 107. (E) Extends to what Things, or Actions in general, touching the *Personalty*.

1. THE statute of limitations runs against every demand so as to be a complete bar, notwithstanding any mesne act intervening, as bankruptcy, *coverture*, &c. For where in *assumpsit* by the assignees of a bankrupt, and plea of *non-assumpsit infra sex annos*, the plaintiff replied that six years were not elapsed at the time of the assignment. On demurrer the defendant had judgment; for though the six years might not have elapsed at the time of the assignment, yet as they were elapsed at the time of bringing the action, the statute was a good bar. *Gray v. Mendez*, 1 Sira. 556.

2. The

2. The statute of limitations runs also against *all bills of exchange, and promissory notes.* *Cheeveley v. Bond, Show.* 340.

3. The statute of limitations extends not to debt reserved by indenture; nor to debts on matters of record. But 20 years without any demand is of itself a presumption that a bond has been paid. 1 *T. R.* 270.

(F. 2) Accounts between Merchants.

15 Vin. 109.

1. **W**HERE the plaintiff, to a plea of the statute of limitations, replied a bill of *Middlesex*, and that the defendant promised to pay within the six years before the suing out of the writ, and it appeared that all the items in the bill whereon the demand arose, except the last, were above six years standing before the bill of *Middlesex* sued out; it was insisted for the plaintiff, that the last item being within six years, and this being an account current never liquidated, should draw the former items out of the statute; but it was held by Mr. *J. Denison* that the clause in the statute of limitations about merchants' accounts extended only to cases where there were *mutual* accounts, and *reciprocal* demands between two persons; but if there were only a demand by *A.* against *B.* in the common way of business, as by a tradesman on his customer, that cannot be called merchants' accounts; and he was clearly of opinion, that in that case the statute was a bar to all demands of above six years standing. *Cotes v. Harris, Bull. N. P.* 149, 150.

2. But where there are *accounts current between parties*, and credit given on both sides, in such case, if any item is within six years, it shall prevent the statute from attaching. *Catling v. Skoulding*, 6 *T. R.* 189.

(H) Beyond Sea. Infants. Feme Covert. Persons imprisoned. *Non compos.*

15 Vin. 112.

1. **I**T seems to have been the better opinion, that the exception in the stat. 21 *Jac.* 1. c. 16. in favour of persons being beyond sea, extends only to the case where the *creditors or plaintiffs* were so absent, and not where the *debtors or defendants* were, because creditors only are mentioned in the statute. *Hall v. Wyborn*, 1 *Show.* 99. But now by 4 *Ann.* c. 16. s. 19. it is enacted, that if any person *against whom* any action lies for seamen's wages, trespass, detinue, trover, replevin, action of account or upon the case, (or other actions mentioned in 21 *Jac.* 1. c. 16. s. 3.), was beyond sea at the time that such action accrued, the *plaintiff* shall be at liberty to bring his action against him within the same time after his return as is limited for such action by stat. 21 *Jac.* 1. c. 16. and 4 *Ann.* c. 16.

2. If

2. If one plaintiff be abroad and the others in *England*, the action must be brought within six years after the cause of action arises. *Perry v. Jackson*, 4 T. R. 516.

3. If the plaintiff be in *England* at the time the cause of action accrues, the time of limitation begins to run, so that if he, or his personal representative, does not commence an action within six years, they are barred by the statute. *Smith v. Hill*, 1 Willf. 134.

4. By 4 Ann. c. 6. s. 17, 18. it is enacted, that all suits and actions in the court of Admiralty for seamen's wages shall be commenced within six years next after the cause of such suits or actions shall accrue, and not after, with a proviso in favour of the plaintiff's infancy, coverture, imprisonment, or residence beyond the seas, at the time the cause of action accrued.

5. The clause as to *persons beyond sea* extends only to such as are actually so. Therefore if a person be in *Scotland*, it is not sufficient. *King v. Walker*, 1 Bl. Rep. 286.

6. The statute of limitations can never begin to run against a plaintiff who is a foreigner until he comes into this realm. *Strithorst v. Greame*, Esq. C. B. 3 Willf. 145.

15 Vin. 724

### (T) Equity. Relief, in what Cases, against the Statute.

1. THE statute of limitations does not extend to a trust. *Com. Rep.* 709. 13 G. 2. *Skirme v. Merick and others*. Nor to accounts current.

2. The statute of limitations was pleaded to a bill of discovery, but the plea was over-ruled. *Bunb.* 60. 1720. *Dean and Chapter of Westminster v. Sir Thomas Cross and others*.

3. Bill by a lay impropriator for tithes for about 24 years. The defendant, as to such part of the bill as prays discovery and relief for any time within six years next before the filing of the bill or serving the *subpoena*, pleads the statute of limitations, and that he did not promise to make any satisfaction for any tithes before the said six years. The plea was over-ruled; for the defendant, as to the tithes, is in the nature of a receiver of bailiff for the plaintiff, in which case the statute does not operate. *Bunb.* 213. 1726. *Marston v. Cleypole and others*.

4. The statute of limitations pleaded by one partner to a bill brought by another for the balance, and an account and satisfaction; and the plea was allowed. *Bunb.* 217. 1726. *Bridges v. Mitchell*.

5. The statute of limitations cannot be pleaded to a bill which charges a *fraud* discovered within six years before the filing of the bill; and in this case it was held that the statute of limitations was pleadable against the *South Sea Company*, in whom the estates of the late directors are vested by act of parliament, in the same manner as it might have been pleaded against the late directors, the

the Company standing in their place; as where the assignee of a bankrupt claims under the act of parliament: yet as the statute of limitations might be pleaded against the bankrupt, it is pleadable against the assignee. 3 *P. Wms.* 143. *Mich.* 1732. *South Sea Company v. Wyndesfell.*

6. To take a debt out of the statute of limitations there must be a *direct admission of a debt*, and in several cases at law it has been held, that there must be an *express promise to pay*: and though a trust for payment of debts is held to revive such debts as have been barred by the statute of limitations, yet the judges have always been dissatisfied. 3 *Atk.* 107. *July* 1744. *Lacon v. Briggs.* Vide also *Ouchterlony v. Earl Powis, Amb.* 231. *May* 1754.

7. Where a real estate is to be affected by a trust to pay debts, plain and clear debts only are revived, and not such as depend upon accounts to be taken. *Ib.*

8. An offer to account will take a case out of the statute of limitations. 2 *Ves.* 485. *July* 1752. *Earl Pomfret v. Lord Windsor.*

(U) *Equity. What Proceedings in Equity are with- 15 Vin. 125.*  
in it.

1. THE statute of limitations is a bar in equity as well as at law. *Com. Rep.* 710. 13 *G.* 2. *Skirme v. Meyrick and others.*

2. It appeared in this case that the right of the plaintiff, and of those under whom he claimed, had accrued near thirty years since, during all which time the defendant's possession had been unmolested: the statute of limitations was pleaded, and though it was urged that the plaintiff had not the lease in his possession, and that the defendant in his plea had set forth that the lease had been renewed; and although it was also insisted, that however the plaintiff might be disabled from bringing an ejectment, yet he might bring a bill in equity; the Chancellor refused to grant relief in the case of so stale a demand, and allowed the plea. 3 *P. Wms.* 263. *East.* 1734. *Low v. Burron.*

3. Length of time, which will not bar an ejectment, will not bar a bill in equity. 3 *P. Wms.* 287. *Trin.* 1734. *Cook v. Arnham.*

4. The statute of limitations shall bind an infant where his trustee neglected to sue within six years, so where an executor or administrator neglects to sue. 3 *P. Wms.* 309. *Trin.* 1734. *Wyeh v. East India Company.*

5. A corporation shall have the benefit of the statute of limitations, as well as a private person. *Ib.*

6. A bill in chancery, which had been depending almost six years, is not to be considered a sufficient demand of the debt to take it out of the statute of limitations. 1 *Atk.* 282. *Hill.* 1736. *Lake v. Hoyer.* And 2 *Atk.* 1. *Hill.* 1736. *Anon. S. P.*

7. If

7. If the statute of limitations be neither pleaded nor insisted on by answer, the defendant cannot have the benefit of such bar to the plaintiff's demand. 1 *Atk.* 493. *Hill* 1737. *Prince v. Heylin*.

8. Though a receiver be appointed by the court, yet that will not alter the possession of the estate in the person, who shall be found entitled at the time the receiver was appointed, so as to prevent the statute of limitations running during the right in dispute. 2 *Atk.* 15. *Hil.* 1737. *Anon.*

9. T. S. devises all his real and personal estate to G., his heirs, &c. charged with the payment of his debts; the plaintiffs, who are bond creditors, never asked for their principal, but received their interest regularly of G., the executor for 16 years, and G. during this time made several sales of the testator's estates: the Master of the Rolls dismissed the bill brought by the bond creditors against the purchasers, whom he would not disturb after a possession of 16 years. 2 *Atk.* 41. *July* 1740. *Elliot and others v. Merriman*.

10. Where a judgment was outstanding, and no satisfaction entered, the court of Chancery refused to decree it satisfied merely upon presumption of length of time, the judgment being 42 years standing, and especially since the statute for the amendment of the law 4 *Anne*, c. 16. s. 12. allows a plea of payment at law, as it is an old judgment. 2 *Atk.* 45. *July* 1740. *Kemys v. Ruscomb*.

11. The statute of limitations cannot be pleaded to the discovery when the debt was due, though it may be pleaded to the debt itself; because, by the defendant's setting forth when the debt commenced, it will appear to the court, whether the six years are incurred according to the statute. 2 *Atk.* 51. *July* 1740. *Mackworth v. Clifton*.

12. Where the enjoyment of an estate has been for 21 years, courts of law, as well as courts of equity, will make a strong presumption in favour of such possession, though there may be some circumstances to shew that it was not the intention that the inheritance should be conveyed. 2 *Atk.* 67. *Nov.* 1740. *Cooke v. Cooke*.

13. Lord Lucas by his will left to Dorothy Potter an annuity of 25*l.* for her life; she dies in 1718; the plaintiff, the representative of the annuitant, in 1740 brings his bill for the arrears of the annuity, from the year 1708 to the death of Dorothy Potter. The court, from the length of time, presumed it to have been paid, and dismissed the bill with costs. 2 *Atk.* 71. 1740. *Smallman v. Lord Archibald Hamilton*.

14. Where no demand has been made on a bond for 20 years, the judges will direct a jury to find it satisfied. 2 *Atk.* 144. *March* 1740. *Gratwick v. Simpson and Moore*.

15. Portions, which became due in 1673, were sued for in 1717; such a length of time creates a strong presumption that they are paid, and it almost amounts to proving a negative to induce the court to believe that they are still unpaid. 2 *Atk.* 177. *April* 1741. *Sir Thomas Standish v. Madley*.

16. Length

16. Length of time pleaded in bar to a redemption of a mortgage which was made in 1713, the mortgagor's solicitor appearing to have settled an account in 1730 in order to pay off the mortgage, Lord *Hardwicke* held that would secure the right of redemption. 2 *Atk.* 333. July 1742. *Anon.*

17. Coverture is no excuse for not redeeming a mortgage; for if a woman becomes afterwards discover, the statute of limitations will run from that time; neither is a tenancy by the curtesy any excuse, for it is of no consequence to a mortgagee who have the equity of redemption; if they do not make use of their right they shall be barred. *Id.*

18. Though an original be filed at law, yet if there has not been any proceeding upon it for six years, it will not prevent the statute of limitations from running. 2 *Atk.* 395. August 1742. *Lacon v. Lacon.*

19. Transactions with a foreign prince and his government do not concern the trade of merchandize, and persons concerned in such transactions are not within the exceptions in the stat. 21 *Jac.* 1. A letter of attorney from one merchant to another to get in debts, will not make the person so deputed a merchant within the statute. 2 *Atk.* 610. July 1743. *Sturt v. Mellish.*

*The exception in the statute as to merchants' accounts was to prevent dividing the account where running, and part within the time and part before. 2 Vef. 400. Aug. 1751. Welford v. Liddel.*

20. A creditor by 4 *Ann. c.* 16. has the same privilege on the debtor's being beyond sea, when the cause of action accrues, as he had by the stat. of *James*, on his being beyond sea himself; and where a creditor, who has been out of the kingdom, returns, the time will run, and his going abroad again will give him no privilege, for that was gone by his having once returned after the cause of action accrued. *Id.*

21. It has been said that the statute of limitations will not run against one joint-tenant or tenant in common, unless an actual ouster is made; there must be some ouster; but if after such ouster a tenant in common, or joint-tenant, continues in possession of the whole for 20 years, it is a bar. 2 *Atk.* 632. July 1743. *Story v. Lord Windsor and others.*

22. An executor of a house steward to Lord *Bradford*, after an acquiescence of 17 years, sets up a demand for a large sum due for business done by his testator, to which the representative of Lord *Bradford* insisted on the statute of limitations, which was allowed. 3 *Atk.* 105. July 1744. *Lacon v. Briggs.*

23. The statute of limitations cannot be pleaded against a breach of trust, nor can a person who has taken a conveyance from the trustee shelter himself under a plea of that statute. 3 *Atk.* 459. March 1746. *Boteler v. Collington.*

*But the rule that a trust is not within the statute of limitations, applies*

*only, between trustees and cestui que trust, and not against a trust by implication, as affected by an equity. 1 Bro. Ch. Rep. 551. May 1783. Townshend v. Townshend.*

24. Where there has been no demand of principal or interest on a bond for twenty years, satisfaction of the debt will be presumed,



fumed, except in cases of mortgage: the mortgagee is supposed to continue in possession, and the mortgagor to be tenant at will to him. 1 *Ves.* 51. Nov. 1747. *Letman v. Newnham*.

25. Where the owner of a rent charge suffered it to run in arrear for eight years, it is not to be presumed absolutely released. 1 *Ves.* 267. July 1749. *Aston v. Aston*.

26. Bill lies by the assignee of a bankrupt for delivery of goods pledged by the bankrupt, notwithstanding the statute of limitations. 1 *Ves.* 278. July 1749. *Kemp v. Westbrook*.

*A remainder-man expectant on an estate for life or years, to whom a right to enter or bring an ejectment is given by the forfeiture of the tenant for life or years, yet such remainder-man is not bound to do so, and if he comes within his time after the remainder attached, it will be good; nor can the statute of limitations be insisted on against him for not coming within twenty years after his title accrued by forfeiture.* 1b.

27. Bill filed for a strict settlement, after a long acquiescence by the plaintiff's ancestor, when it had become impossible to bar the remainder, and dismissed. 1 *Ves.* 530. August 1750. *Paraker v. Phillips*.

28. Courts of equity discourage suits for old, stale accounts; but every case of this kind must stand upon its own circumstances; and length of time does not in equity bar an administrator from calling for an execution of a trust of real estate. 2 *Ves.* 482. July 1752. *Earl Pomfret v. Lord Windor*.

*An offer to account will take a case out of the statute of limitations.* 1b.

29. Filing a bill for equitable relief is equivalent to the bringing an action at law as to preventing a fine being set up as a bar; but filing a bill for a discovery merely is not. But this decree was afterwards reversed in *Dom. Proc.* 1 *Bro. Ch. Rep.* 289. Trin. 1783. *Pincke v. Thornycroft*.

30. Although non-payment of interest for twenty years on a mortgage, where clear, and no demand, raises a presumption of payment; yet on doubtful circumstances, and the original mortgage admitted, it was referred to the Master to inquire whether any interest had been paid, 3 *Bro. Ch. Rep.* 289. July 1791. *Trafsh v. White*.

31. Demurrer to a bill charging fraud in misrepresenting the value of an estate to the vendor, on the ground that the transaction was 27 years old, and had been confirmed by a deed 23 years since, overruled, length of time being no ground for a demurrer. 3 *Bro. Ch. Rep.* 633. Trin. 1792. *Earl of Deloraine v. Browne*.

*A bill of review will not lie after twenty years.* Amb. 645. May 1767. 3 *Bro. Ch. Rep.* 639. in notes, S. C. Though a bill of review cannot in general be brought to reverse a decree after 20 years, this does not apply to persons having contingent interests, and then not existing; or being under disabilities. 4 *Bro. Ch. Rep.* 441. Mich. 1793. *Lytton v. Lytton*.

32. Payment of a legacy presumed, after 40 years elapsed and no demand proved. 4 *Bro. Ch. Rep.* 115. Mich. 1792. *Jones v. Turberville*. 2 *Ves. jun.* 11. S. C.

33. Bill by next of kin for personal estate, secured by mortgage, given to a charity. The will was dated in 1754; the bill was not filed

filed till 1792. In a common case the suit could not be sustained after such a lapse of time; but in this case the parties not being apprised of the law, as to the bequest of money on real security given to a charity being void, and no presumption on that account arising of a release, his Honour referred it to the Master to inquire into and state the circumstances. 4 Bro 214. Feb. 1793. *Pickering v. Earl of Stamford*. 2 Ves. jun. 272. S. C. Upon the report, the personal estate was decreed to the next of kin. 2 Ves. jun. 581.

34 Account of rent of an estate held of trustees; the statute of limitations was insisted on, but the account was ordered only for six years before the bill filed. 4 Bro. Ch. Rep. 468. *Hercy v. Ballard*.

35. Creditors are not relieved in equity after gross laches; therefore where a creditor, seven years after coming of age, filed a bill to obtain the benefit of a decree to account, and after answer took no steps for 33 years, and then filed another bill against the residuary legatees of a party, whose assets were distributed with notice to the plaintiff, and against other representatives, the bill was dismissed upon the laches only, though the question of satisfaction was doubtful. 2 Ves. jun. 87. 1793. *Hercy v. Dinwoody*, 4 Bro. Ch. Rep. 257. S. C.

36. Attornies' bills of costs examined after a long period, and payments made. 2 Ves. jun. 202. 1793. *Newman v. Payne*.

37. Statute of limitations cannot be pleaded to a legacy, nor to an annuity. 2 Ves. jun. 571. 1795. *Higgins v. Crawford*.

38. Defendant pleaded 40 years possession without account or admission of any debt to a bill setting up an old mortgage, and stating an account settled, and that owing to infancy, coverture, and other disabilities, plaintiff could not proceed. Plea allowed. 2 Ves. jun. 669. July 1795. *Blewit v. Thomas*.

39. Laches do not run upon a large body of creditors. 3 Ves. jun. 740. May 1798. *Whichcote v. Lawrence*.

40. Forty-six years after a decree, directing an execution of the trusts of a will, and a conveyance in fee to the tenant in tail male, who had also the reversion in fee, with the consent of the only intermediate remainder-man in tail male, a bill was filed against their devisees: the plaintiffs claiming under an old voluntary grant out of the reversion, the estates tail being spent and no recovery having been suffered, and praying a discovery and conveyance, a general demurrer was allowed; though the devise and conveyance were stated only by way of pretence, and not expressly charged; the whole right, as against the defendant, being founded upon that conveyance. 5 Ves. jun. 3d November 1799. *Fletcher v. Tollet*.

41. Upon possession for many years, the origin of which did not appear, nor any title except as *cestui que trust* under a term to raise a sum of money, the court would not presume any other title, and decreed the plaintiff to be let into possession on paying the charge; but with reluctance, and on account of the laches, re-

fused an account of the rents even from the filing of the bill. 5 *Ves. jun.* 565. July 1800. *Acherley v. Roe*.

42. A son, tenant in tail in remainder, when just of age in 1769, joined his father, the tenant for life, in a recovery for the purpose of raising 3000*l.* for the father and resettling the estate; the son taking back only an estate for life, with remainder to his first and other sons, &c. The equity, which he might have had against that settlement, was lost by his marriage and acquiescence till after the death of his father in 1793, though under the circumstances there was no probability of issue. 5 *Ves. jun.* 852. March 1801. *Brown v. Carter*.

43. Bill to be paid a debt of 20 years standing due from Sir Thomas Johnson; by his will he directed his personal estate to be applied in payment of debts, and if the personal estate should not be sufficient, then his real estate to be subject to his debts. This takes the debt out of the statute. *Dickins' Rep.* 48. 1726. *Blakeway v. Earl of Strafford*.

44. Where creditors received interest from the assignee of devisee in trust for the payment of debts for 11 years, and agreed with him for an increase of interest on their debts, and received the same, the original trustees are liable. 1 *Anstr.* 110. 33 G. 3. *Hardwick v. Mynd*.

45. The testator leaves assets sufficient to pay all debts and legacies; the legatees receive payment, which the creditors might also have had, if they had demanded it in time, they lie by for 11 years, and the estate is wasted; yet the legatees shall refund. *Ibid.*

46. Baron and feme seised in fee in right of the feme mortgage by fine, and afterwards convey the equity of redemption by lease and release to the mortgagee. The mortgagee having remained in possession as complete owner for more than 20 years, during the life of the husband, tenant by the curtesy, the heir of the wife is not barred of his equity of redemption by the lapse of time. 1 *Anstr.* 138. Feb. 33 G. 3. *Corbett v. Barker*. 3 *Anstr.* 755. S. C.

47. Where there is a grant from the crown of land to be recovered from the sea, and it is left unembanked for a long space of time, as a common passage for ships over it, the right of the crown revives by the length of possession by the subjects; for it would be extremely inconvenient if old dormant grants of the crown could be enforced, when the evidence of their nature and extent is lost by lapse of time. 2 *Anstr.* 615. 35 G. 3. *Attorney-General v. Richards*.

48. After 20 years possession and a descent cast, the heir at law of a former owner filed a bill for discovery of the title of the occupant, suggesting a preterited devise from his ancestor; a demurrer was allowed. 3 *Anstr.* 709. 36 G. 3. *Mutloe v. Smith*.

49. Fifteen years possession of a benefice is *prima facie* evidence of a regular induction and of reading the 39 articles. 3 *Anstr.* 942. 37 G. 3. *Chapman v. Beard*.

## ***Lis pendens.***

[G]

### What is.

15 Vin. 187

1. **A** Decree is not implied notice to a purchaser after the cause is ended, for it is the pendency of the suit that is notice: but if the decree is only for an account, and does not put an end to the question, the suit is still notice. *Worsley v. E. Scarbro'*, 3 *Atkyns*, 392.
2. A suit about money secured on an estate or other collateral matter, but not relating to the estate, it is not notice to a purchaser of the estate pending the suit. *Ibid.*
3. If a bill is brought to establish a will, it is *lis pendens*, and affects a purchaser under the will. *Garth v. Ward*, 2 *Atkyns*, 174.
4. If an estate be purchased by private contract, after a bill brought by creditors for sale of it, the sale will be set aside. *Ambler*, 676.

### (C) Pleadings.

15 Vin. 189.

1. **P**LEA that another action is depending in another court for the same thing is bad, for plaintiff need not make his election till defendant has answered. *Jones v. E. Strafford*, 3 *P. Wms.* 179.
2. That the bill is for the same matter for which plaintiff brought another bill is not a good plea, if the last is brought in a different right; as, if the first is an executor or administrator, the second as administrator *de bonis non*, &c. of intestate. *Huggins v. York Buildings Company*, 2 *Atk.* 44.
3. In the *Exchequer*, if the plaintiff admits the plea of a former suit depending, he shall pay 40s. If it is allowed on the hearing by the court, 3*l.* costs. *Rules and Orders in the Exchequer*, 6 Rule, 13.
4. A plea, of another suit depending for the same matter, mult set forth when it was instituted. *Foster v. Vassal*, 3 *Atk.* 587.
5. If a creditor who has come in and proved his debt before the Master, under a decree at the suit of another creditor, brings a new bill, the former suit is a good plea. 3 *Atk.* 557.
6. If there is a decree for tythes, and the account is depending before the Master, the defendant may plead this suit and decree to a new bill brought; for the account in this court (Chancery) is taken down to the time of making the report. *Bell v. Read*, 3 *Atk.* 590.

## Lunatic, Non compos, and Idiot.

25 Vin. 111.

### (A) Custody. Who shall have it, and how.

1. **T**HE custody of lunatic may be granted to a *feme covert*, though she be not *sui juris*, but under the power of her husband. 3 P. Wms. 111. 1720. *Ex parte Kingmill, in notis.*

2. One, though of great age, being deprived of his memory, and become almost *non compos mentis*, was admitted to answer by his guardian, in regard the demand in question was but small; but had the demand been considerable, the regular way had been to have taken out a commission of lunacy, and have gotten a committee assigned. *Ibid. in notis. Anon.*

3. Vagrants only, and not persons of rank, are within the act which empowers justices of the peace to take care of lunatics. 2 Atk. 52. *Anon. August 1740.*

4. Whether the stat. 4 G. 2. extends to lunatics at large, or only to lunatics of whom the custody has been granted by the great seal; and whether it extends to lunatics of whom a curator has been appointed abroad. *Amb. 80. Ex parte Marchioness of Anandale. December 1749.*

5. A committee was appointed of the lunatic's person and estate, with a restriction not to receive any of the estate himself, and a receiver was also appointed. *Amb. 104. Ex parte Billingshurst. August 1750.*

6. Bankruptcy of the committee of the person of a lunatic is a sufficient cause for removing him on account of the fund for maintenance; but the custody of the person will not be changed if the Master finds it proper, with regard to the comfort of the lunatic that it should continue. 3 Ves. jun. 2. *Ex parte Mildmay. Nov. 1795.*

25 Vin. 132.

### (B) Power of the Committee. And Allowances.

1. **T**HE court allowed the profits of the lunatic's estate to the committee for the maintenance of his person. The lunatic dies, his administrator brings a bill for an account of these profits; the defendant, the committee, pleads this order of court for the allowance of the profits for the lunatic's maintenance. The plea was ordered to stand for an answer; but as there was no fraud, the court would not grant the relief prayed. 3 P. Wms. 105. *East. 1731. Sheldon v. M. Justice Fortescue Aland, and others.*

2. The

2. The king's grant of a lunatic's estate without account is void; but the king or lord chancellor may allow such yearly maintenance to a lunatic as amounts to the yearly value of his estate. *Ibid.* 110.

3. A committee of a lunatic's real estate may cut down timber for repairs. 2 *Atk.* 407. *Aug.* 1742. *Ex parte Ludlow.*

4. A sum of money devised to be laid out in lands in *England* in trust for *A.*, with remainders over, is, by act of parliament, secured on *A.*'s estate in *Scotland* during his minority. *A.* attains the age of 21, and becomes lunatic: the money may be called in and laid out pursuant to the trust. It is to be considered as an estate in *England*, and a proportion to be settled for his maintenance and debts between his estates in *England* and *Scotland*. Another sum, in the Exchequer in *England*, arising from the sale of heritable jurisdiction in *Scotland*, considered as real estate in *Scotland*. 2 *Ves.* 381. *July* 1751. *Marquis of Anandale v. Marchioness of Anandale.*

5. The committee of a lunatic not allowed any thing for his trouble: but in this case, on account of particular circumstances, the allowance for maintenance was increased. *Amb.* 78. *In the Matter of Annesley.* *Oct.* 1749.

6. It is a rule never to vary or alter the property of a lunatic so as to effect any alteration as to the succession to it. *Amb.* 80. *Dec.* 1749. *Ex parte Marchioness of Anandale.*

7. In this case the court ordered money to be lent to discharge incumbrances on the lunatic's *Scotch* estate, it being for his convenience; and divers instances were mentioned of the power of the Chancellor over the *Scotch* estates of a lunatic, who was in *England.* *Ibid.*

8. The committee has a lien on the lunatic's estate recovered by him; and the solicitor employed for him was declared to stand in the place of the committee, and to have a lien for his bill. *Amb.* 103. *Barnesly v. Powell.* *Aug.* 1750.

9. Committee of a lunatic's estate not permitted to pass his accounts, without inquiry what money is in hand from time to time. 1 *Ves. jun.* 156. *Ex parte Catton.* *June* 1790.

10. On a bill by a son, the committee of the father, who was a lunatic, to set aside a voluntary settlement by him, a motion, for the defendant to be at liberty to let the house, sell the furniture, and bring the money into court, was refused, the plaintiff not consenting. 1 *Ves. jun.* 160. *Colman v. Croker.* *June* 1790.

11. A lunatic is to have every comfort his situation and fortune will admit of, without any consideration for those in expectancy. *Ves. jun.* 295. *Ex parte Chumley.* *May* 1791.

15 Vin. 135. (D) *Acts, or Grants, &c. of a Lunatic, confirmed or avoided.*

1. **W**HERE, before an inquisition of lunacy, a person, who was found a lunatic, has made a purchase with the approbation of his only son, the court would not change the disposition which had been made of the sum of money, but let the purchase stand; and it was said, that the court had allowed part of a lunatic's personal estate to be laid out in repairs, and even upon improvements of his real estate. 2 *Atk.* 414. *Sergefon v. Sealy.* *Off.* 1742.

2. 15 *Geo.* 3. c. 20. enacts that the marriage of a lunatic, only found so, shall be null and void, unless he be previously declared sane by the Lord Chancellor.

15 Vin. 137.

### (D. 3) Other Matters.

1. **N**O appeal from an order of the Lord Chancellor touching lunatics to the House of Lords, but only to the king in council. 3 *P. Wms.* 104. 1731. *Sheldon v. Mr. Justice Fortescue Aland, and others.*

2. After the jurisdiction of the court of wards was taken away, the jurisdiction over idiots and lunatics reverted back to the court of Chancery, to which it originally belonged. 2 *Atk.* 553. 1743. *The Bailiffs and Burgeffes of Burford v. Lentball.*

3. Where there is any misbehaviour in the execution of a commission of lunacy, the court, upon examination, may quash it, and direct a new commission. 3 *Atk.* 6. Nov. 1743. *Ex parte Roberts.*

4. The person against whom a commission of lunacy issued, on the different appearance he made upon a second inspection, was allowed to traverse the inquisition, and the grant of the custody was suspended till further order. *Ibid.* 7.

5. The Lord Chancellor can make an order in a lunatic's affairs after his death. *Amb.* 706. 1772. *Ex parte Grimstone.*

6. Mortgage on a lunatic's estate paid off with his money, and the mortgage term ordered to be assigned in trust to attend the inheritance, and held not to go to his next of kin. *Ibid.*

7. Where there is a reference to the Master in a case of lunacy, he shall make his report, although the lunatic be dead. 3 *Bra. Ch. Rep.* 238. 1791. *Ex parte Armstrong.*

8. Petition that a fund in court belonging to the plaintiff, or the interest of it, might be paid to the plaintiff's wife, for the maintenance of himself and family, he being in a state of mind, which, though not amounting to lunacy, was of too great imbecility, in consequence of a paralytic stroke, to do legal acts. And the court ordered the interest to be paid to the wife from time to time.

time. 4 *Bro. Ch. Rep.* 100. 1792. *Bird v. Lefevre*. See *Ex parte Nadin*, before Lord *Thurlow*, 4 *Nov.* 1786., where he said that he was not against the practice of finding a man a lunatic, who was, by the infirmities of age, rendered unequal to the management of his affairs, but that the more usual way was to appoint him a guardian. 1 *Fonb. Treat.* 64.

9. Timber was felled on a lunatic's estate by the committee by order of the court, the produce is personal estate of the lunatic. *Oxenden v. Lord Compton*, 4 *Bro. Ch. Rep.* 231. and 2 *Ves. jun.* 61. S. C. 1793.

10. In this case the Chancellor, in deciding a motion for a new trial, laid down general principles relating to cases of lunacy. 4 *Bro. Ch. Rep.* 443. 1792. *Attorney-General v. Panther*.

11. The Lord Chancellor cannot, upon a petition in lunacy, order part of a lunatic's estate to be sold for payment of his debts, to prevent a bill by his creditors. 5 *Ves. jun.* 556. 1800. *Ex parte Smith*.

(E) *How the Lunacy shall be tried, and what is a* 15 Vin. 138.  
good Return.

1. THE rules of judging in equity and at law in cases of insanity are the same. 2 *Atk.* 327. 1742. *Bennet v. Vade*.

2. An inquisition of lunacy is always admitted to be read, but is not conclusive evidence, as it may be traversed. 2 *Atk.* 412. 1742. *Sergeant v. Sealy*.

*Where a man was found lunatic on two inquisitions, the court would not allow him to traverse.* 3 *Atk.* 184. 1744. *Ex parte Barnelly*. But where an inquisition found a person an idiot, the court allowed him to traverse. Cited in the above case of *Ex parte Barnelly*. The heir of a lunatic is bound upon the traverse of an inquisition. 3 *Atk.* 308. 1746. In the *Matter of Roberts*. And where the alienor and the lunatic traverse, if he be found a lunatic at the time of the alienation, the alienor is bound. *Ibid.*

3. That *W. B.* was incapable of governing himself and his lands, &c. is an illegal and void return to a commission of lunacy. 3 *Atk.* 168. 1744. *Ex parte Barnelly*. The uniform returns are, *lunaticus, non compos mentis*, or, since the proceedings have been in *English*, of unsound mind. *Ibid.*

4. Where the lunacy of a person is in question, the court will make a provisional order as to his effects, till the point as to the lunacy is determined. 3 *Atk.* 635. 1748. In the *Matter of Heli*.

5. In this case a commission was denied, the party being only of a very weak understanding. 2 *Ves.* 407. *Lord Donegal's case*. And it was said by the Lord Chancellor *Hardwicke*, that finding a man an idiot for so many years past was good. *Ibid.*

6. A commission issued to inquire of the lunacy of one beyond sea, directed where the mansion-house and great part of the estate lay. 2 *Ves.* 401. *Aug.* 1751. *Ex parte Southcot*. *Amb.* 109. S. C.



## Lunatic, Non compos, and Idiot.

7. The commissioners and the jury have a right to inspect the person. And costs were decreed against a person having him in his custody and not producing him. *Ibid.*

8. A person found a lunatic by a competent jurisdiction abroad, considered a lunatic here. 2 *Ves. jun.* 588. 1795. *Ex parte Gillam.*

9. No objection to the return to an inquisition finding a person lunatic, that it does not state, that the lunatic has or has not lucid intervals. A traverse to a return to an inquisition finding a person a lunatic is a right by law, though the Lord Chancellor is not dissatisfied with the return upon the evidence. And the order was suspended for the purpose of taking the traverse. 5 *Ves. jun.* 450. 1800. *Ex parte Ferne.*

10. In the above case, it was said by the Chancellor that the pleading a traverse is short; merely stating the inquisition, taking the common traverse upon it, and then the attorney joins issue. *Ibid.*

11. Upon the return of the traverse to the inquisition of lunacy, finding that the party was a lunatic at the time of her marriage, and at the time of taking the inquisition, but at the time (of the verdict) was not a lunatic, the commission was superseded. The Chancellor doubted whether the double return was good. 5 *Ves. jun.* 833. 1801. *Ex parte Ferne.*

12. Traverse to an inquisition finding a person lunatic is *de jure*, and not matter of favour. *Ibid.*

25 Vin. 140.

### (K) Lunatic and Trustee enabled to transfer.

1. *A.* Found *non compos* before the senate of *Hamburg*, a mortgagee within the stat. 4 *G. 2. c. 10.*, and will be directed to convey. 1 *Ves.* 298. 1749. *Ex parte Otto Lewis.*

2. A trustee found a lunatic by the Master's report, cannot be ordered to convey under the statute, unless a commission of lunacy has issued. 2 *Ves. jun.* 587. 1795. *Ex parte Gillam.*

## Mariners.

25 Vin. 233. (A. 2) Mariners' Wages. Payable or lost. In what Cases, and how much.

1. ACTION by a sailor for wages in a voyage "to Newfoundland, and from thence to Spain or Portugal, or some port in the Mediterranean." The contract was, "That the wages should

should be paid at that port at which such wages were *usually* due." Upon the trial it appeared that the ship was taken after its arrival at port in *Newfoundland*, and upon its voyage from *Newfoundland* to its port of delivery. The court were of opinion that no wages were due, the ship being lost before its arrival at its port of delivery; for it is one entire voyage, the fish being the only lading of the ship. *Hernaman v. Bawden et al. Executors of Ford*, 3 Burr. 1844.

2. The plaintiff was a sailor on board defendant's ship, which was taken and ransomed. The captain, on behalf of his owners, promised to pay him 4*l.* a-month in order to induce him to become a hostage. This is binding on the owners, and the plaintiff shall recover the amount in an action against them. *Yates v. Hall et al.* 1 Term Rep. 71.

3. An officer or sailor who has engaged to serve on board a letter of *marque* for certain wages during the voyage, and a share of all prizes, is not entitled to any part of the wages, if the ship is taken before she completes her voyage; although he shall have been sent from the ship before the capture, as prize-master, on board a prize taken in the course of the voyage. *Abernethy v. Landale*, Doug. 523.

4. The cargo of the ship was lost by the capture of a privateer, who carried her into G. The master staid three months to refit, and take in new lading, and, to prevent the seamen going away, agreed to pay them so much *per* month while they staid. In an action, the master would have excused himself, on the rule that freight is the mother of wages, and that none are paid while the ship is lading and unlading. Pratt C. J. agreed that this was the general doctrine, but held it not sufficient to control the special agreement. *Campion v. Nicholas*, 1 Stra. 405.

(B) Wages. Suable for. *In what Court, and when.* 25 Vin. 236.

1. MARINERS cannot sue in the court of Admiralty for wages due upon a special agreement under seal, and executed at land; and the court granted a prohibition. *Howe Esq. v. Napier*, 4 Burr. 1944. *Day et al v. Searl*, 2 Stra. 968. S. P.

2. But after sentence, the court will not grant a prohibition upon this ground, where it does not appear upon the face of the proceedings, that the court below have no jurisdiction. *Buggin v. Dennet*, 4 Burr. 2035.

3. A carpenter of a vessel may sue for wages in the Admiralty. *Wheeler v. Thompson*, Stra. 707.

4. So may a boatswain. *Ragg v. King*, Stra. 858.

5. But a suit shall not be allowed in the Admiralty for the wages of the master; for his contract is founded upon the credit of the owners, and not of the ship. *Ibid.*

6. Where the mate became master during the voyage, and sued in the Admiralty for his wages as mate, and for a further allowance

## Mariners.

since after he became master, the court granted a prohibition *quoad* the time he was master, and refused it *quoad* the time he was mate. *Reed v. Chopman*, *Str.* 937.

7. Though a pilot be a mariner, yet he cannot sue in the Admiralty for wages for piloting a ship from *Sea Reach* to *Deptford*, both being within the body of the county, and therefore out of the Admiralty jurisdiction. *Rys v. Walker*, 2 *Wils.* 264.

## Market.

15 *Vin.* 247.

### (B) Fair. Stallage.

1. **I**N trespass for breaking and entering the plaintiff's close, and erecting a stall there. Defendant pleaded three pleas. The 3d, being the material one, was, "That there is a public market held every *Saturday* in the *locus in quo* for selling butchers' meats; wherefore he entered the market with his meat in order to sell it, and for that purpose erected a stall for the necessary exposing his meat to sale, and laid it upon the stall *prout ei bene licuit quæ est eadem*," &c. Replication, that plaintiffs were seized in fee of the close and market, and that defendant, without their licence, and of his own wrong, entered and erected the stall; frivolous rejoinder and demurrer. Resolved *per cur.* 1st, That though every person has of common right a liberty of coming into a public market to buy and sell, without paying any toll, if not due by custom or prescription; yet he has not of common right a liberty of placing a stall there, but must have licence from the owner of the soil, if there be no particular sum fixed by the custom of the market for stallage. If there be a sum or duty by custom, that cannot be exceeded, but still he must agree with the owner of the soil. If it be a toll it is *sui generis*, for toll can only be due by grant or prescription; but the owner is of common right entitled to stallage in a new erected market, and the soil is no further appropriated to public use than the common right to enter the market to buy and sell. 2dly, Trespass is the proper remedy: for neither debt nor *assumpsit* would lie, nor could the owner of the soil distrain, as there is not any certain fixed sum or duty, or contract expressed or implied. *The Mayor, &c. of Northampton v. Ward*, 1 *Wils.* 107. 2 *Str.* 1238. S. C.

2. If the soil or pavement is picked, dug up, or broke, in erecting a stall, &c. it is called *piccage*. *Ibid.*

3. So, where trespass was brought for breaking and entering plaintiff's close, and placing thereon divers tables, stools, baskets, pots, pans, and other utensils. Defendant pleaded, 1st, general issue; 2d, justification, for that the *place where* is an open market, and

and that he placed the tables, &c. there to expose them to sale. Replication and demurrer. Judgment for the plaintiff. For by the last case no man can erect a stall in a market without leave, and the court cannot criticise and distinguish between a *table* and a *stall*. *The Mayor, &c. of Norwich v. Swan*, 2 Black. 1116.

(C) Fair. *What Things Strangers may do*, . 15 Vin. 245.

UPON the authority of *Davis v. Leving*, 2 Lev. 89. cited in *Vin. Abr. (C)*, pl. 3. it was held, That the inhabitants of one market town, city, borough, or town corporate, are not prohibited by 1 & 2 Ph. & M. c. 7. from selling woollen cloth, &c. in other market towns, &c. by retail, and not in open fair. *Lee v. White et al. Dougl.* 243.

(F. 3) Proceedings. Pleadings and Judgment. How. 15 Vin. 247.

1. A *Quo warranto* will not lie for encouraging and promoting the holding a market; for the defendants are only guilty of a misdemeanor at most, and there is no usurpation of a franchise. *Rex v. Marsden et al.* 3 Burr. 1812. 1 Black. Rep. 579.

2. *Quere* whether an information in the nature of a *quo warranto* for usurping a fair or market upon the crown can be granted upon the application of a private person? The court gave no decided opinion upon the question in *Rex v. Marsden*, determining that case upon the point mentioned above; but they seemed to incline that it would not lie. *Ibid.*

(H. 2) *What Things may be sold out of the Market.* 15 Vin. 248.

NO hawker can expose goods to sale in any part of a market town but the public market place by 29 G. 3. c. 26. s. 16, 17. *Rex v. Redfearne*, 4 Term Rep. 273.

(I) Of the Toll *Book-keeper*, and Property altered by Sale in Market overt or Fair. 15 Vin. 249.

THE original owner of goods stolen, who prosecutes the felon to conviction, has a right to the restitution of them: but he cannot recover the value of them in trover from a person who purchased them for a valuable consideration in market overt, and who has resold them before conviction, notwithstanding that the owner gave him notice of the robbery while they were in his possession. *Horwood v. Smith*, 2 Term Rep. 750.

[A]

## Marriage.

15 Vin. 254. (D) What is, or amounts to a Marriage, or shall be said Evidence thereof.

1. IT was doubted by Lord *Mansfield* whether a marriage in Scotland, in fraud of the *English* marriage act, was valid.

1 *Bl. Rep.* 259. 2 *Bur.* 1080.

2. But such a marriage was solemnly held good, first in the spiritual court and afterwards by the delegates. *Compton v. Bearcroft, cor. Delegates*, 1 *Dec.* 1768. *Bull. N. P.* 113.

3. In a suit for jactitation of marriage, and plea of a clandestine marriage (before the marriage act); strong acknowledgments for 18 years together were held by the delegates upon appeal to be sufficient to establish the marriage even *inter vivos*, although no actual proof of it was given. *Hervey v. Hervey*, 2 *Bl. R.* 876.

Sees if given  
in a collate-  
ral suit for a  
criminal ac-  
tion. *Ib.*

4. A marriage in *France*, established by the sentence of a court having proper jurisdiction thereof there, is conclusive by the law of nations. *Roach v. Garvan*, 1 *Vesf.* 159.

5. Said *per* Lord *Hardwicke*, *ibid.* That when the persons and fortunes of minors are under the care of the court of Chancery, a foreigner who contrives a marriage with one of them abroad is guilty of a contempt of the court, and if I afterwards got him here I would punish him. *Roach v. Garvan, ib.* 159.

6. In a question relative to a parish settlement, it is not necessary to shew that all the solemnities were regularly observed; for though in a suit of jactitation of marriage such proof is necessary, yet in other cases (as the legitimacy of children and the like) the usual presumptive proofs of marriage are not taken away by the statute. *St. Devereux v. Much Dew Church*, 1 *Bl. R.* 367.

(E) Good, in respect of the Person to whom.  
—— Degrees prohibited.

1. A Prohibition was denied to a suit in the spiritual court for marrying his wife's sister's daughter. *Denny v. Asbwell*, 1 *Str.* 53.

2. The ecclesiastical court cannot annul an incestuous marriage after the death of one of the parties; but may proceed to punish the survivor. *Brownsword v. Evans*, 2 *Vesf.* 245.

(E) The Licence and Registering; Banns and Place where; and Punishment of marrying otherwise; what; and in what Cases. 15 Vin. 258.

1. 26 *Geo. 2. c. 33. s. 1.* All banns of marriage shall be published in an audible manner in the parish church, or chapel, in which banns had been usually published, of the parish to which the persons belong, upon three *Sundays* preceding the marriage, in time of service, immediately after the second lesson; and if they live in different parishes, to be published in each; and if in an extra-parochial place, in the next parish church; and all the rules of the rubrick; and the marriage to be solemnized in one of the churches where the banns were published.

*Sec. 2.* No parson shall be obliged to publish banns unless notice of the names, place, and time of residence has been delivered seven days before.

*Sec. 3.* Parson solemnizing marriage, after publication of banns, between persons under age, without consent of parents or guardians, but without notice of such dissent, shall not be punishable; and if the parents or guardians shall declare or cause to be declared, at the time of publication of banns, their dissent thereto, the publication of banns shall be void.

*Sec. 4.* No licence shall be granted to solemnize a marriage except in the parish church or chapel where one of the parties has resided for at least four weeks; or, if an extra-parochial place, in the adjoining.

*Sec. 5.* Saving to the Archbishop of *Canterbury* his right of granting licences to marry at any convenient place.

*Sec. 8.* If any person shall solemnize matrimony in any other place than a church or public chapel, unless by licence from the Archbishop of *Canterbury*, or shall solemnize matrimony without publication of banns, without a licence; shall be guilty of felony, and be transported for 14 years; and all marriages so solemnized shall be null and void.

*Sec. 10.* Provided that after solemnization of marriage, under publication of banns, proof of residence in the parish shall not be necessary; nor, where by licence, proof of residence in the parish where solemnized; nor shall proof to the contrary be admitted.

*Sec. 11.* Marriages by licence, where either party, not a widow or widower, is under 21, without the consent of the father or guardian, or mother (if no father or guardian), first had and obtained, shall be null and void.

*Sec. 12.* Where mother or guardians are *non compos mentis*, abroad, or refuse consent, the party may apply to the Lord Chancellor, who, if he finds the marriage proper, shall declare accordingly, and the marriage shall be valid.

*Sec. 13.* No suit in the ecclesiastical court shall lie to compel a marriage by reason of any contract.

*Sec. 14.* Churchwardens are to provide books in which the list of banns and marriages shall be kept, and the entries signed by the parson.

*Sec. 15.* All marriages must be in the presence of two witnesses, and to be registered, and signed by the parties, and witnesses, and minister.

*Sec. 16.* Parson convicted of making false entries, or altering or forging entries in the register, or of forging any licence, or of destroying the register, he shall be guilty of felony, and suffer death.

*Sec. 17.* This act not to extend to the marriages of any of the royal family.

*Sec. 18.* Not to extend to *Scotland*, nor to any marriages among Quakers or Jews, where both parties are of either of these religions; nor to any marriage solemnized beyond seas.

2. The marriage of a pauper, being contrary to the 26 G. 2. c. 33. s. 11. (the husband being under age), was holden to be absolutely void, for the marriage act is made against both the contracting parties, and therefore they cannot waive the disabilities of it, as they might if made for their benefit. *Cheldham v. Preston*, *Burr. Sett. Cas.* 486. S. C. 1 Bl. R. 192.

3. A marriage was held void, being celebrated in a chapel erected since 26 G. 2., although marriages had *de facto* been frequently celebrated there. *Rex v. Nathfield*, *Doug.* 659.

4. In consequence of this determination the stat. 21 G. 3. c. 53. passed, by which all marriages, *before that time*, solemnized in any consecrated church or chapel erected since 26 G. 2. were made valid, and the clergymen, who had celebrated the same, were exempted from the penalties of that act.

5. A bastard is within the marriage act, and if married under age, without banns, and without consent of father, guardian, or mother, it is void. *Rex v. Hodnett*, 1 Term Rep. 96.

25 Vin. 264.

### (I) Brocade Bonds, &c.

1. *A.* Treats for the marriage of his son, and in the settlement of the son there is a power reserved to the father to jointure any wife whom he should marry in 200*l.* *per annum*, paying 1000*l.* to the son: the father treating about marrying a second wife, the son agrees with the second wife's relations to release the 1000*l.*, but takes a private bond from the father for the payment of this 1000*l.* Equity will not set aside this bond, for it would be injurious to the first marriage, which being prior in time is to be preferred. 3 P. Wms. 66. 1730. *Roberts v. Roberts*.

2. Plaintiff, having paid his addresses to the defendant *Hannah Woodhouse*, against her father's consent, prevailed upon her to execute a bond in the penalty of 600*l.* with a condition "that if the above-bonded *Hannah Woodhouse* do, on or before the expiration of 13 months after the decease of her father *Robert Woodhouse*, according

“ according to the usage of the church of *England*, espouse the defendant *Ralph Shepley*; if the above-named *Ralph Shepley* will thereto consent, and the laws of this realm will permit the same; or if it shall happen the said *Hannah Woodhouse* shall not nor will not marry the said *Ralph Shepley* as aforesaid, but shall happen to marry with some other person, then the said *Hannah Woodhouse* shall and will well and truly pay unto the said *Ralph Shepley* the sum of 500*l.* of lawful *British* money, at or immediately after the failure of such marriage; but if it shall happen that the said *Hannah Woodhouse* shall die before the time appointed for the said marriage, then the said *Hannah Woodhouse* shall leave and give the said *Ralph Shepley* 10*l.* as a token of her love, to buy him a suit of mourning with, then this obligation to be void.” There was also a bond from defendant to her in the like penalty, and with nearly the like condition. The father died, and after the expiration of 13 months the plaintiff filed her bill to be relieved against her bond, and died, and the suit was revived by her administrator. There was a cross bill by *Ralph Shepley* to have satisfaction for this bond out of the assets of *Hannah Woodhouse*, alleging he was willing to have married her, but was prevented having any access to her by her brothers. The Chancellor considered *Hannah Woodhouse*’s bond to the defendant in the nature of a marriage brokerage bond, and decreed it to be delivered up, and dismissed the cross bill. 2 *Atk.* 535. 1742. *Woodhouse v. Shepley*.

3. The plaintiff gave the defendant a note for 2000*l.* for undertaking to procure him a marriage with a lady; the fact being supported by affidavit, the court made an order on the defendant to keep the note in his own possession, and not assign or indorse it over, but would not extend the injunction so far as to restrain him from proceeding at law. 3 *Atk.* 566. 1747. *Smith v. Askwell*.

4. Articles before marriage to secure an annuity out of the wife’s estate to her servant, who had influence over her; and a bond for 1000*l.*; the bond was delivered up, and there was a new grant of the annuity after marriage. The consideration of the bond and of the annuity was directed to be tried. 1 *Ves.* 503. July 1750. *Cole v. Gibson*.

5. Bill by husband after the wife’s death to be relieved against a bond given by her to her aunt just before marriage; where a debt is contracted for valuable consideration, though concealed from the husband, it is no fraud upon the marriage. This cause came on upon bill and answer, and a consideration was sworn positively to in the answer, and also, that it was at the request of the wife herself that the obligee concealed the transaction from her husband; the bill therefore was dismissed with costs. 2 *Ves.* 264. 1751. *Blanchet v. Foster*.

6. Parol evidence admitted to shew that though a bond on marriage was for 150*l.* per annum, yet the agreement was for 100*l.*; but the bill was dismissed, as being founded on a private agreement



ment to deceive a material party: 2 *Ves.* 376. July 1751: *Pitcairn v. Ogbourne*.

7. Injunction granted to restrain defendant from recovering a demand from one of the plaintiffs, he having represented to the agent of the other plaintiff, on a treaty of marriage with his daughter, that there was no such demand existing. 1 *Bro. Ch. Rep.* 543. 1782. *Neville v. Wilkinson*.

*On a treaty of marriage between Lord Arbuthnot, then a minor, and the daughter of Morrison, it was agreed that Morrison should pay 50,000 marks as a portion for his daughter, and a settlement was agreed to be made by Lord Arbuthnot and his friends in consideration of that fortune. The night before the execution of the articles Morrison prevailed upon Lord Arbuthnot privately to sign a writing, purporting that the real agreement was for 40,000 marks only, and that Morrison had agreed to the contract for 50,000 marks upon the express granting this private agreement, by which Lord Arbuthnot bound himself to release Morrison from 10,000 marks, part of the 50,000 marks. When Lord Arbuthnot came of age he brought his action to have this obligation reduced, on two grounds; first, that it was granted by him whilst a minor, without the consent of his guardians; 2dly, that it was contra fidem tabularum nuptialium. The Lords of Session sustained the reason of reduction, and held the obligation null; and on appeal to the House of Lords, their decree was affirmed. Morrison v. Arbuthnot, in Dom. Proc. 1728., cited in the above case, together with Blanchet v. Foster, 2 *Ves.* 264., and Webber v. Farmer, 2 *Bro. Par. Cal.* 38.*

11 Vin. 265.

### (K) Portions on Condition; in what Case the Breach forfeits the Condition.

1. **T**HE trust of a term under a settlement was, that if there should be two or more daughters of the marriage; then the trustees were to raise and pay to each the sum of 2000*l.*, if she marry with the consent of her mother, if living, and a widow; if not, then with the consent of the trustees, or the survivor of them, his executors, administrators, or assigns; and in case any of the daughters die before the portion was paid, that it should not go to the executor, but the estate should be exonerated thereof, or if raised should go to him on whom the reversion of the premises is limited to descend. The father afterwards by his will gives the farther sum of 2000*l.* to each of his daughters, as an augmentation of their portions, subject to the same conditions as their original portions, and if any of the daughters die before the original portions become payable, then he wills that this 2000*l.* should not be paid to her executor, but that his lady and executrix should have the residuum of this money, and makes her residuary legatee. The plaintiff *Hervey* married one of the daughters without consent, and *Clutton* another, also without consent; they are not entitled to the portions either under the settlement or will. 1 *Atk.* 361. 1737. *Hervey v. Aston*, Com. Rep. 726. S. C.

2. "I give the sum of 1000*l.* to my only daughter *Mary Graydon*, to be paid her at her age of 21 years or on the day of marriage, which shall first happen, provided she marry by and with the consent of my executors, but in case she die before the money becomes payable, on the conditions aforesaid, then I give the said 1000*l.* equally between my two youngest sons, *Benjamin and Gregory Graydon*—*Mrs. Mary Graydon*, grandmother of *Mary Graydon*, *Mary Graydon*, the mother, and

and Jeremy Gregory, the uncle, to be executors. The mother, after giving to her daughter *Mary Graydon* all her wearing apparel, jewels, &c. expressed herself as follows: "then my will is, that in case my daughter *Mary Graydon* shall marry before she comes to the age of 21 years, without the consent and approbation of my executor under his hand first had and obtained (if he be living), that then she shall not be entitled to any part of such legacies, as I have herein left her, but that whole share shall be divided amongst my sons *Benjamin* and *Gregory Graydon*; the residue, after her debts and legacies paid, she gives to her three children *Benjamin*, *Mary*, and *Gregory*, equally to be divided between them, share and share alike, and appoints her son *John Graydon* to be her sole executor." Bill against the defendant *Hicks*, the husband of *Mary Graydon*, to relinquish 1000*l.* left under the will of the father, she having married without consent of his executors, and also to relinquish the legacies under the will of the mother; the executors under the will of the father were all dead before the marriage of *Mary Graydon*, and *John*, the mother's executor, renounced. The court was of opinion, that *Mary Graydon* was entitled to the 1000*l.* under the will of the father, but not to the portion under the will of the mother. *Graydon v. Hicks*, 2 *Atk.* 16. 1739.

3. Trustees saying in a letter, "we shall be obliged to consent for the happiness of the lady," will be construed a present consent. 2 *Atk.* 265. 1738. *Daley v. Desbouverie*.

4. An executor brings a bill for the discovery of the defendant's marriage; she demurs; for that if she were to discover what is asked it would be a forfeiture of her legacy of 1500*l.*, it being given conditionally, if she married with the consent of the trustees under the will. Demurrer allowed. 2 *Atk.* 392. 1742. *Chauncey v. Tabourden*, *Ibid.* 616. *Chauncey v. Fenboulet*, 2 *Ves.* 265. 3 *Atk.* 260. *Lucas v. Evans*. S. P.

5. Question on the marriage settlement of Sir *John Wrottesley*, who created a term for years in trust, "to raise and pay, if one child only, 6000*l.*; if two, 6000*l.* to be equally divided; if three or more, 8000*l.* to be equally divided, and to be paid at their respective ages of 21, or marriage; and it was provided, that if any of the said younger children should marry in the father's life-time, without his consent, and, after his death, without the consent of the mother, such child should forfeit his or her said intended portion, to be distributed among the rest, at the age of 21 or marriage, with such consent; with a farther proviso, that if any such child should marry without such consent, or die before 21 or marriage, with consent, the portion to be divided among the survivors, at the age of 21 or marriage, with consent." *Frances*, one of the daughters, married with Mr. *Bendisb*, without the consent of the mother; and it was held by Lord *Talbot*, in August 1734, that she had forfeited her portion, and it was decreed to the other children. One of the daughters is since dead, before 21 or marriage; and the petitioner, Mr. *Bendisb*, who married *Frances*, applies now in the right of his wife, who

is 21, for her distributive share of her sister's contingent portion ; and the question was, whether *Frances*, as she has forfeited her original portion, is entitled to a share of this contingent portion, on the death of her sister before 21 or marriage ; and the court held she was not, and dismissed the petition. 2 *Atk.* 584. 1743. *Wrottesley v. Wrottesley.*

6. Where there is a condition annexed by a will to a devise, either of real or personal estate, and no notice required to be given ; unless the legatees perform the condition, they cannot be entitled ; and where there is a devise over, a forfeiture incurs. This was the case of a legacy on condition of marrying with consent. 2 *Atk.* 616. 1742. *Chauncey v. Graydon.*

7. " If my daughter marry with the consent of trustees, or the major part of them, and signified in writing before such marriage " had, then I give to her, and not otherwise, 800*l.* ;" and the testatrix directed *M.* to pay her 30*l.* yearly, whilst she continued sole, 45*l.* each *May* day, and *All Saints* day, and charged all her real estates with debts of all kinds and legacies. The daughter, after the death of the mother, married the plaintiff, without consent of the trustees, and died soon after ; but before her death the trustees declared their consent in writing. The Chancellor directed the plaintiff to be paid the arrears of the 30*l.* *pro rata* till the marriage ; and in case the personal estate should be exhausted by debts, so much of the real estate to be sold as will pay the 800*l.* and the arrears of the annuity. 3 *Atk.* 330. 1746. *Reynish v. Martin.*

8. Testator gave to each of his grand-daughters, who should be living and *unmarried* at the time of his death, on their respective days of marriage, " the sum of 1500*l.*, and he desired that none of his grand-daughters should marry without the consent of the father and mother, or the survivor of them ; and therefore if any or either of them should marry without such consent, then by his will he revoked what was thereby directed to be paid to such grand-daughter or grand-daughters, and such of them should not be entitled to any benefit by virtue of such his will, further than what the father and mother, or the survivor of them, should direct ; and he afterwards directs, that after the several legacies and sums directed to be paid are satisfied, if any sum of money should remain in the hands of the trustees, the survivors or survivor of them, the same should be paid to his daughter *Philadelphia* for life, and after her decease to the defendant *Bingham* and his heirs." The plaintiff, one of the grand-daughters, married without the consent of the father and mother, and filed her bill for the legacy ; the mother of the plaintiff appointed trustees of the legacy for the plaintiff for her separate use for life, and to her issue, but if she has no issue, then to the defendant *Bingham*. The court was of opinion that there was no devise over in this case, and that the plaintiff was entitled to her legacy. 3 *Atk.* 364. June 1746. *Wheeler v. Bingham.*

9. Estate given to a wife during her widowhood, with remainder over; it is good as a limitation; but if given over on her marrying again within a limited time, it operates as a forfeiture. *Amb.* 209. 1753. *Jordan v. Holkham.*

10. Devise, in case his daughter shall marry with consent and approbation of *N. H.* in writing, but in case she marry without such consent or approbation, the whole, after the death of the survivor of her and her husband, to go to — *&c.*; she married without the previous consent of *N. H.*, but he approved of the marriage afterwards in writing; held no forfeiture. *Amb.* 256. 1755. *Burleton v. Humsfrey.*

11. Settlement on two daughters; proviso, if either marry without the consent of their mother, it should be to her separate use, *&c.* The mother proposed and encouraged the marriage of one of her daughters with Lord *S.*, and afterwards refused her consent out of pique and resentment: the marriage was had without her consent; no forfeiture. *Amb.* 263. 1755. *Lord Strange v. Smith.*

12. Testator bequeathed to his daughters 1500*l.* each, to be paid them respectively at the time of their marriages, with consent of his executrix and executor, who are made guardians during their minority, with a clause for maintenance and education till 21; held, a child attaining 21, her legacy was vested: the condition is to be understood as confined to marriage under 21. *Amb.* 662. 1768. *Knapp v. Noyes.*

13. Devise, if *A.* or *B.* shall marry into the families of *C.* or *D.* and have a son, then I give my estate to that son: if they shall not marry, then to *E.* *A.* and *B.* married, but not into the favoured families; the marriage is a condition precedent which they have their whole lives to perform, and *E.* has no claim till their deaths. 1 *Bro. Ch. Rep.* 55. *Randal v. Payne.*

14. Testator devises the residue of his estate to his children, but if any of the daughters shall marry without the consent of the mother or guardian, her share to go to those unmarried; this is a condition subsequent, and a daughter, who married without consent, is notwithstanding entitled. 1 *Bro. Ch. Rep.* 528. 1780. *Jones v. Earl of Suffolk.*

15. The testator, among other provisions, gave to a putative daughter 10,000*l.* in several events; one moiety at 21, *in case she should be then unmarried*; but if she married before 21, *with consent of her mother*, then the whole to be paid to her, or settled to her use; but if she should die before 25, the 10,000*l.* was given to the mother, to whom there was also a gift of the residue generally. The daughter married under 21, without consent; she does not come within the description to which the gift attached; it is therefore void, and the 10,000*l.* sinks into the residue given generally to the mother. 2 *Bro.* 431. 1788. *Scott v. Tyler.*

16. Legacy given to a female infant; by the codicil, testatrix gave the father a power, in case she married, during his life-time,

without consent, to appoint; she marries *once* with consent; the condition is satisfied. 3 *Bro. Ch. Rep.* 128. 1790. *Hutchefon v. Hammond.*

17. Legacy to plaintiff, in case of marriage with consent of parents; they consent by a writing *to any marriage she may contract*; after the decease of the survivor plaintiff marries; consent was only necessary during the lifetime of the father and mother, or the survivor; if otherwise, this general consent is sufficient. 4 *Bro. Ch. Rep.* 327. 1793. *Mercer v. Hall.*

18. Condition in restraint of marriage under 21, without consent of trustees, established both as to a rent charge and a personal legacy. 3 *Ves. jun.* 89. 1796. *Stackpole v. Beaumont.*

19. Condition by will, requiring the consent of trustees to marriage, not applicable to the second marriage of a daughter, who had married between the date of the will and the death of the testator, and was a widow at his death. 3 *Ves. jun.* 227. 1796. *Grommelin v. Grommelin.*

15 Vin. 273 (K. 2) Conditions annexed to Portions determined.

1. *A.* Gave 20*sol.* to *Agnes* his daughter, payable at her age of 21, or marriage, if she marries with the consent of her executors; provided if either of the legatees die before their legacies become payable, such legacy to be divided between the survivor of her brother and sister. *Agnes* married at 15, without the consent of the executors; held to be a condition *in terrorem*, and that the legacy is vested, as marriage, one of the contingencies, has happened. 2 *Atk.* 184. 1741. *Underwood v. Morris.*

2. Personality given to trustees to pay dividends, &c. to *R.* at 28, or marriage, with consent, and in case any of the children should die before their shares became due, the share to go to the rest of the children, and their issue *per stirpes*. *R.* married without consent, had a child, since dead, and died under 28; held the portion never vested, but the testator, having five children, held that one fifth part of it vested in her child, and it was accordingly decreed to the father as her representative. 1 *Bro. Ch. Rep.* 303. 1783. *Hemmings v. Munkley.*

15 Vin. 271 (L) Settlements. By Agreement before Marriage.

What is a good Performance. In regard of the Manor.

1. *A* Settlement will control a writing executed after, but the parties refusing to execute a settlement without it, they must be construed as one entire agreement, and both consistent. 2 *Atk.* 560. *May 1743. Tyrrel v. Hope.*

2. The

2. The words *separate use* were not in a note given by the husband to his wife before marriage, by way of marriage agreement, yet the words "enjoy the profits," imply it. *Ibid.*

3. Settlement by the son tenant in tail in possession, in consequence of an agreement made during the life of the mother, who was tenant for life; and being beneficial to the family, not set aside, though made at the instance of the father, who took an interest under it. 1 *Bro. Ch. Rep.* 369. 1784. *Mincham v. Mincham.*

## (M) Settlements. Performance good. In regard of <sup>15 Vin. 273.</sup> the Matter.

1. *A.* On marriage gave bond to settle an estate of inheritance of 100l. a year on himself and wife, and the issue of the marriage; he settled the perpetuity of a pension payable out of the customs; held a good performance. *Amb.* 391. 1760. *Middleton v. Pryor.*

2. Personal estate is of so fluctuating a nature, that it is impossible to make every specific article the subject of settlement, 5 *Ves. jun.* 274. 1800. *Randall v. Willis.*

## (N) Settlements after Marriage without Articles, or <sup>15 Vin. 274.</sup> Agreement precedent. Good in what Cases.

1. *A* Settlement being *voluntary*, is not for that reason fraudulent, but an evidence of fraud only; but there is hardly a case where the person conveying was indebted at the time of the conveyance, that it has not been deemed fraudulent. 1 *Atk.* 15. 1738. *Russell v. Hammond.*

2. A voluntary settlement is not fraudulent, where the person making it was not indebted at the time, and subsequent debts will not shake it. *Ibid.*

3. Where the father tenant for life, and the son tenant in fee, join in a settlement, it is good against creditors; for the son might have disposed of the residuary interest without the father's joining. *Ibid.*

4. Where the father takes back an annuity to the value of the estate comprised in the settlement, it is *tantamount* to a continuance in possession, and creditors will be relieved against such a settlement. *Ibid.*

5. Upon the statute 27 of *Eliz.* subsequent purchasers shall prevail to set aside a settlement, that is voluntary and not for a valuable consideration. 1 *Atk.* 94. 1745. *Walker v. Burrows.*

6. A settlement after marriage is good, if it be upon payment of money as a portion, or an additional sum, or even an agreement to pay money, if afterwards paid. 1 *Atk.* 190. 1744.

*Brown v. Jones.*—*Stileman v. Ashdown*, 2 *Atk.* 479. S. P. *Ward v. Smallet*, 2 *Ves.* 13. 2 *Ves.* 308 *Hylton v. Bisbee*.

7. Where a marriage settlement is executed after marriage, in pursuance of articles *previous* to the marriage, and the limitations are to the husband for life, to the wife for life, and to the heirs of the body of the husband to be begotten on the wife, it is executory, and will be carried into strict settlement by the court: otherwise if executed after marriage without any articles previous to the marriage to direct the uses of such settlement. 2 *Atk.* 39. 1740. *Glanville v. Payne*.

8. It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement to make it fraudulent; for if he does it with a view to be indebted at a future time, it is equally so, and ought to be set aside. 2 *At.* 481. 1742. *Stileman v. Ashdown*.

9. A., entitled to 500*l.*, marries whilst an infant; the husband, by deed after marriage, agrees the 500*l.* shall be to her separate use for life, and after her death, to the issue of the marriage; in the deed was a proviso, empowering the trustee to lend a part or the whole to the husband: he lent him 500*l.*, and in fourteen months after the husband became a bankrupt; the trustee filed his bill to be admitted a creditor, and Lord *Hardwicke* decreed, that he should come in as a creditor under the commission for the money he paid to the husband, saying, "that where a man married an infant, and made no provision before marriage, a settlement made afterwards is good, where there is no proof of his being indebted at the time." 2 *Atk.* 519. 1742. *Middlecome v. Marlow*.

10. A husband who had 1733*l.* stock devised to him after marriage, vests it in trustees for the benefit of himself for life, of his wife for life, and afterwards for the benefit of his children: the settlement is void as to creditors before and after the marriage, and the trust estate was decreed to be sold and applied in payment of the husband's debts. 2 *Atk.* 600. 1743. *Taylor v. Jones*.

11. A wife having a contingent interest, under a bond given by the husband on the marriage, but no judgment entered up, nor any trustees added for her, had also a lease of the corn-meter's office left her by the will of her father, whose executor would not assent to the husband's sale thereof, unless he made a further provision for her; but on a meeting with her friends, she agrees, upon settling part of the money arising from the sale for her separate use during her husband's life, and afterward for the children of the marriage, she will part with her interest under the bond; the other part of the money to go to the husband; who becomes bankrupt. Bill by the assignees under the commission to subject her separate property; but the court refused and dismissed the bill. 2 *Ves.* 17. 1750. *Ward v. Smallet*.

12. To impeach a settlement after marriage under the 13th *Eliz.*, the husband must be proved to have been indebted at the time,

time, and to the extent of insolvency. The creditor not producing any evidence, his bill was dismissed; with liberty to file another. 5 *Ves. jun.* 385. May 1800. *Lush v. Wilkinson*.

13. A settlement after marriage reformed in favour of the issue against the devisee of the husband, claiming under the reversion, by his letter of instructions for drawing the settlement: but this equity did not prevail against creditors. 5 *Ves. jun.* 596. 1800. *Burflow v. Milvington*.

(O) Settlements after Marriage. By Agreement before Marriage. Good as to Creditors, &c. 15 Vin 276.

1. THE plaintiff, before her marriage with *John Tyrrell*, was seized in fee, or her mother *Mrs. Stanton* was, of an estate in *Berkshire*, and in consideration of the intended marriage, and of 1500*l.* paid to Mr. *Tyrrell* as her portion, it was agreed that the estate should be settled previous to the marriage, so as that one moiety might be enjoyed by the plaintiff's mother for her life, and after her decease by the plaintiff, or her trustees, for her sole and separate use, exclusive of her husband, and that she should receive the rents and profits during her husband's life, and that as well the said moiety after the plaintiff's decease, as the other moiety, should be settled upon such trusts as the plaintiff, by any deed in her lifetime or by will, should appoint. Mr. *Tyrrell*, the intended husband, undertook to procure deeds to be drawn pursuant to the agreement; but when the deeds were reading over to the plaintiff in order to their execution, she observed there was a mistake, for that the moiety of the premises limited to her mother for life, was after her decease limited to the use of Mr. *Tyrrell* for life, and not to her separate use, as had been agreed: and she refused to execute unless the mistake was rectified: in order to do this, it was then proposed by the trustees, that Mr. *Tyrrell* should give a note or writing under his hand, that the plaintiff should take and receive one moiety of the estate after her mother's death for her sole and separate use, according to the agreement, as if the same had been so settled by the release; and thereupon Mr. *Tyrrell*, previous to the execution of the deeds, gave the plaintiff a note or writing to the purpose aforesaid, and delivered it to the trustee named in the release, to keep for the plaintiff's benefit. The marriage was had, and *Mrs. Stanton*, the mother, died soon afterwards; and on the 14th *February* 1740, a commission of bankruptcy issued against Mr. *Tyrrell*. Mr. *Hope* and others were chosen assignees, and being got into the receipt of all the rents of this moiety, refused to let the plaintiff receive them, or to make any settlement for securing the receipt thereof pursuant to the agreement before marriage. The bill was therefore brought against *Hope* and the other assignees for an account of what they had received of the rents, and that a moiety of them for the future might be assured to the plaintiff for her sole



and separate use. And the court was of opinion, that as she would be entitled to relief against the husband, she was equally entitled to it against his assignees. 2 *Atk.* 558. May 1743. *Tyrrell v. Hope.*

2. Upon the marriage of the defendant with her late husband, he and his father promised to settle an estate on her in consideration of the marriage and 1000*l.* portion; but she refusing to let the father have the portion, he said she should have none of his lands, and would not settle them upon her, but conveyed them to his son in fee. The son, seven years afterwards, being indebted, settled the estate upon her for a jointure, and then in strict settlement, and died. His creditors brought this bill against his widow, and infant son, for satisfaction of the plaintiff's debt. The court was of opinion that there was no colour to say that this settlement was for a valuable consideration. 1 *Ves.* 27. 1747. *Beaumont v. Thorp.*

3. Husband, on his second marriage, contracts to pay money in trust for the wife for life, and afterwards for the issue of that and a son by a former wife: his creditors cannot come upon this against the son, as being a voluntary disposition in regard to him. 1 *Ves.* 215. 1748. *Khell v. Beane.*

4. A man may, as between himself and his wife, make an agreement or declaration of trust in his life, which, though not for a valuable consideration, shall take effect against his executors, but not against creditors. 1 *Ves.* 539. 1750. *Attorney-General v. Whorwood.*

5. Settlement after marriage of the wife's property, reciting, and in pursuance of a parol agreement made before, in trust as to part of the produce to the separate use of the wife, as to the rest for the husband for life, then to the wife for life, then among the children according to the appointment of the survivor, good against the creditors of the husband. 1 *Ves. jun.* 196. 1790. *Dundas v. Dutens.*

15 Vin. 276. (P) *Marriage Agreements unperformed. Decreed,*

1. *A.* On his marriage covenanted, that if his wife should die before him, leaving issue of their bodies, he would pay, grant, secure, or sufficiently settle to and for such issue, one third part of all his chattels, real and personal, which at the death of the wife he should be possessed of, to be divided between them, if more than one, as he should direct. The wife died leaving two daughters; and the husband, during the coverture, acquired some freehold leases for lives. Held, that these leases were included in the covenant, but that the daughters were not entitled to a division, until after the death of the father, which he was decreed to give security to make. 5 *B. P. C.* 208. 1756. *Hauket v. Jones and others.*

2. By

2. By a settlement, made previous to the marriage of *A.* and *B.*, certain Exchequer annuities were vested in trustees in trust for the husband for life, then to the wife for life, and after both their deaths, for the children of the marriage equally at their ages of 21, happening after the death of their father and mother. There was issue only one son, who attained 21 and survived his father, but died in the lifetime of his mother. Upon a question between her and the son's executor, who was entitled to these Exchequer annuities, it was held, that they became vested in the son on his attaining 21, and were deviseable by him, notwithstanding he died in his mother's lifetime. *Jeffereys v. Reynous*, 6 Bro. Par. Caf. 260. 1767.

3. Mr. *Marfb*, a mercer, died possessed of goods to the amount of 2000*l.* and upwards; some time after his death, his widow married her husband's journeyman; but before the marriage articles were entered into, reciting that she was entitled to an estate of the value of 600*l.* and upwards, and also reciting that he had taken the money and given a bond for securing the sum of 600*l.* to trustees for her separate use, and that she should have the power to dispose thereof as she should think fit by deed or will; and being also in possession of some plate belonging to her first husband, she had a further power by articles to sell it and pay the money arising from the sale into the hands of the same trustees, for the use of her children by the first husband. The wife is dead, having executed a deed and appointed the 600*l.*, and also the plate, for the use of her children, to be equally divided between them. The second husband is become bankrupt, and the children by the first applied to the commissioners to be admitted creditors for the 600*l.*, and to have the plate delivered up to them. The commissioners refused, upon the suggestion of the bankrupt, that he was drawn in, and deceived in the opinion he had of his wife's fortune before the marriage. The application to the court was, that the plate might be delivered up to the children, and that they might be admitted creditors under the commission for 600*l.*; which was directed accordingly, the Chancellor saying that marriage, even without a portion, was a sufficient consideration for an agreement, and that a woman's fortune falling short of the husband's expectations, is no reason for setting aside a marriage settlement. 1 Atk. 159. 1744. *Ex parte Marfb*.

4. Where a settlement made after marriage gives an equivalent to the issue for what they were entitled to under the settlement previous to the marriage, the court would have dispensed with carrying that before the marriage into execution: but in the settlement made after marriage in this case, no equivalent was given to the issue, and therefore the settlement *before*, which is for the benefit of the issue must be pursued. 2 Atk. 39. 1740. *Glanville v. Payne*.

5. A limitation in marriage articles to the husband for life, to the wife for life, remainder to the issue of their two bodies, will not entitle a husband, by virtue of such a remainder, to dispose of the

the estate as he shall think proper, but will be carried into strict settlement. 2 Atk. 71. Nov. 1740. *Villiers v. Villiers*.

6. *Edward Buffey*, termor for 99 years, by settlement conveys it to trustees, in trust, to permit his wife, *Grace Buffey*, to receive the rents during the term, if she so long live, and after her decease to permit him to enjoy the rents during his life, and after his decease, in trust for the heirs of the body of *Grace*, by *Edward Buffey*; and for default of such issue, remainder to *Henrietta Hodgson* for life, and after her decease, in trust for her two sons, *William* and *Edward*. *Edward Buffey* died, never having had any issue, and *Grace* his wife survived him. Lord *Hardwicke*, Chan., held, that the whole term did not vest in *Grace Buffey*, and that the words "heirs of the body" were not words of limitation, but words of purchase; and directed the lease to be deposited for the benefit of all parties. 2 Atk. 89. Nov. 1740. *Hodgson v. Buffey*.

7. *Elizabeth Burnaby*, by an agreement made on her father's and mother's marriage, was entitled to 6000*l*. Mr. *Burnaby*, just before his marriage, signed a paper, whereby he agreed that every thing, which should come to *Elizabeth* by her father's death, should go to them for their respective lives, and after the death of the survivor, to the heirs of the body of *Elizabeth* by him begotten: as this was a limitation to the heirs of the wife, it vested in her only, and the husband consenting, the court decreed the 6000*l*. to be settled on her and her children. 2 Atk. 474. Dec. 1742. *Green v. Ekins*.

8. *A.*, a younger son of *B.*, by his marriage settlement recites the provisions he was entitled to by his father's settlement, and among the rest to an equal share of 2000*l*. after the father's death; then there was a trust for the benefit of the issue of the marriage, and a covenant by him that all such share of the said 2000*l*., or any other sums provided for the portion of the younger children as should afterwards come to him, should be within the aforesaid trusts. The surplus of the rents and profits of *B.*'s real estate, limited for the benefit of his children, after some particular provisions, was, during *B.*'s life, decreed to be distributed among his children. A bill is filed against *A.* by his children to have his share of that surplus, and any that should be afterwards paid him by order of the court placed out for their benefit, as being comprised within the trust of his marriage settlement. Held that the plaintiffs had no right or interest in the defendant's share of this surplus. 1 Ves. 57. Nov. 1747. *Vane v. Vane*.

9. Marriage articles to settle land on husband and wife, and the heirs of the body of the husband by the wife. After marriage a settlement was made, reciting the articles, and said to be in performance of them, by which the estate was conveyed in the words of the articles. Husband and wife levied a fine, and sold the estate. On a bill by the son of the marriage, the court refused to carry the articles into execution by a strict settlement against the purchaser, who had no notice of them; but the articles not being

being produced, the bill was dismissed. *Amb.* 515. *Feb.* 1766. *Cordwell v. Mackrill.*

10. When a tenant-right estate settled upon marriage is renewed, the renewal is to the uses of the settlement. 1 *Bro. Ch. Rep.* 197. *March* 1783. *Pickering v. Vowles.*

11. The testator had by settlement reserved an election of conveying certain parcels of land or paying a certain sum of money: not having elected during his life, and the personalty being inadequate to the payment of his debts, the estate shall be conveyed. 2 *Bro. Ch. Rep.* 5. 1785. *Tysen v. Benyon.*

12. Marriage articles are not decreed in strict settlement where it appeared by a difference in the penning of the limitations, that the parties intended to leave a part in the father's power. 2 *Ves.* 358. 1751. *Howel v. Howel.*

13. Articles on marriage to settle estates of the husband and wife of equal value, in strict settlement, and providing portions: the wife's estate being withdrawn by decree on account of her infancy, the youngest children were confined as against the eldest to half their portion: the articles providing in the event of no issue male, in which case the estates were to separate, that each should bear a moiety; though they also contemplated the case of the wife's refusal to be bound, providing against it by the forfeiture of her interest. 5 *Ves. jun.* 710. *Feb.* 1800. *Clough v. Clough.*

## (Q) Agreements. Unperformed, decreed after the Death of Husband or Wife. 15 Vin. 279.

1. *C.* By articles on his marriage with his first wife covenanted, that all the lands which he should purchase during his life should descend to or be settled upon the heirs male of her body by him begotten. No settlement was made pursuant to these articles; but *C.* having purchased lands, settled them, upon his marriage with a second wife, to different uses. Held that the eldest and only son of the first marriage was entitled to a performance of these articles; and a conveyance was decreed accordingly. 1 *B. P. C.* 470. 1714. *Cusack v. Cusack.*

2. Bill by the daughter and only child of the first marriage of *J. M.* for a specific performance of articles previous thereto, insisting she ought to be tenant in tail of the lands therein mentioned; issue in the articles means females as well as males, and consequently the plaintiff is entitled to have a settlement of these lands in tail. 3 *Atk.* 371. 1746. *Hart v. Middleburgh.*

3. Plaintiffs claimed a reversion in fee, descended to them as co-heiresses of Lord *S.*, by virtue of a settlement made by him in 1687. Lord *E.* claiming under another settlement, and recoveries suffered; and the deed of 1687 being in the hands of Lady *S.*, she refused to deliver it up unless her rights were confirmed, Plaintiffs filed a bill of discovery. Lady *S.* insisted that

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on her marriage and bringing 25,000*l.* portion, it was applied to paying off incumbrances, which, when paid, were assigned to her, and a jointure made of 1600*l.* *per ann.*; and that her husband also covenanted to leave her a house worth 3000*l.* for life, and if not, that his heirs, executors, &c. should pay her the interest of 3000*l.* for her life; and then there was a term of 1000 years in trust, that on his not settling such house according to his covenant, the trustees should, out of the rents and profits of the lands comprised in the term, pay her 150*l.* *per ann.* for life in satisfaction of the covenant. Plaintiffs decreed to confirm this; and after verdict in ejectment, finding that the recoveries were bad, and had not barred the reversion in fee, the plaintiffs insisted on an assignment from her of all the mortgages, &c. paid off by her portion. Held that the representatives of the personal estate should not be preferred to the plaintiffs, who must be indemnified against the 150*l.* *per ann.* out of the personal estate, and the securities assigned for the plaintiffs. 1 *Ves.* 30. 1747. *Lord Portsmouth v. Lady Suffolk.*

4. On the marriage of a daughter there is an agreement, that the father shall immediately pay for her separate use 500*l.*, to which she was not entitled unless she survived him; and that a real estate, which came to her from her mother, should be settled after the uses of the marriage to the father and his heirs; the right heir of the father is entitled to a specific performance of these articles. 1 *Ves.* 73. 1747. *Stephens v. Trueman.*

5. The husband covenants in marriage articles, within six months after the death of his mother and that he should come into possession of the estate in jointure, to settle, &c. He dies in the mother's lifetime, leaving no issue. The estate descends to his heir; he shall not be compelled by the wife to a specific performance. 1 *Ves.* 256. 1749. *Whitmel v. Farrel.*

6. By marriage articles 2000*l.* were to be laid out in land and settled in trust for the husband and wife for their lives, remainder to such of their issue as they should appoint; and in default of appointment, to their issue; the husband died without appointment. Ordered, the settlement to be made on the wife for life, remainder to the first and other sons in tail, &c. *Amb.* 274. 1755. *Dod v. Dod.*

7. A woman before marriage entered into an agreement with the intended husband, that her property should belong to the survivor for life: this agreement, though without seal or stamp, will give the husband an equitable estate for life in lands of which she was seized in reversion. 2 *Bro. Ch. Ca.* 534. 1789. *Hodsdon v. Lloyd.*

8. Money to be laid out in land to be settled to the husband for life, remainder to raise portions for younger children; the money was afterwards invested by direction of the husband in *South Sea* annuities; afterwards, by will, he devises all his manors, &c. generally to certain uses. The money in the funds must be laid out in land. 4 *Bro. Ch. Rep.* 333. 1793. *Hickman v. Bacon.*

9. Husband,

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9. Husband, under a decree to propose a settlement of stock belonging to his wife, transferred to the accountant-general by order, came to an agreement with her out of court, and while they lived apart, but not legally separated, to take part and give her the rest. This agreement does not bind the wife; and the husband dying before any steps were taken for executing it, the whole survived to the wife. 4 *Ves. jun.* 15. July 1798. *Macaulay v. Phillips.*

10. If a settlement of the wife's equitable interest had been approved and ordered by the court, it is binding, notwithstanding the death of either party before it is actually made. 4 *Ves. jun.* 19. 1798. *Ibid.*

11. Settlement upon marriage of stock, the property of the wife, in trust from time to time to receive the dividends, and pay them into the hands of the wife, for her sole and separate use, her receipt to be a discharge; after her decease, if the husband should survive, for him for life; and after the decease of the survivor, to transfer the principal among the children, according to her appointment by will. The trustees, with the privity of the wife, sold the stock, and paid the money to the husband, taking his bond of indemnity; he died insolvent. Upon the bill of the widow and children, the fund, having been replaced by the trustees, was transferred to the accountant-general upon the uses of the settlement; the trustees to pay the dividends to the widow from the death of the husband. 4 *Ves. jun.* 129. August 1798. *Whistler v. Newman.*

### (R) Agreements unperformed, decreed *after* the 15 Vin. 279. Death of both.

**A** Settlement in consideration of marriage, the wife's present fortune and subsequent covenants; one of which was, that the wife's mother should give to the wife or any child equal to what was given to the rest; the mother leaves her a legacy, and by lapse part of the residue comes to her; the wife survives the husband; what he had not reduced into possession goes to her representatives by survivorship, not to his, there being no contract to give him a certain right. 2 *Ves.* 675. 1755. *Garforth v. Bradley.*

### (S) Agreements. Decreed. How. Where there is 15 Vin. 280. a Failure on one Side.

1. **MARRIAGE** agreements differ from all others; as soon as the marriage is had, the contract is executed, and cannot be rescinded; the children are equally purchasers under both father and mother, and therefore these agreements cannot be set aside, because it would affect the interests of third persons. 3 *Atk.* 610. 1748. *Harvey v. Ashley and others.*

2. All

## Marriage.

2. All other agreements are considered as entire; and if either party fails in the performance in part, it cannot be decreed in specie; in marriage agreements it is otherwise, for though either of the relations of husband or wife fail in the performance of their part, yet the children may compel a performance. *Ibid.* 2 *Vef.* 308. *Hylton v. Biscoe.* S. P.

3. If the wife's father agrees to give a portion, and the husband's father to make a settlement, though the former does not give the portion, yet the children may compel a settlement. *Ibid.*

4. Where a female infant is married to a man of large estate, though the dower be a third, and she has a jointure only of a tenth, yet she shall not set aside this settlement for inequality between the dower and the jointure. *Ibid.*

5. On marriage agreement to settle a jointure in consideration of a portion to be paid by the wife's father; though the portion were not paid, the settlement was decreed to be performed. *Amb.* 502. 1741. *Perkins v. Thornton.*

### 25 Vin 280. (U) Agreements unperformed. What shall be said a Satisfaction.

1. *A.* On his marriage settled lands to the use of himself for life, remainder to his wife for her jointure, remainder to the first and other sons of the marriage in tail male; reserving to himself a power of charging the estate with 3000*l.* for younger children, or the payment of debts, and covenanted to lay out 6000*l.* part of the wife's portion, in the purchase of lands, to be settled to the same uses. The 6000*l.* was not laid out. After the eldest son of *A.* came of age, it was agreed in consideration of his advancing 3000*l.* for the purchase of a commission in the army for the son, to make a new settlement more beneficial for the younger children. Accordingly a settlement was made, whereby the lands were limited to the former uses, but *A.* was empowered to charge 3000*l.* for each of his younger children; and his covenant to lay out the 6000*l.* was released. On a bill being filed to set aside this subsequent settlement, and to have the 6000*l.* laid out pursuant to the covenant, the court dismissed the bill, but without costs. *Lord Kerry v. Lord Fitzmaurice,* 5 *Bro. Par. Ca.* 58. 1752.

2. *A.*, previous to his marriage, covenants to secure to his wife an annuity of 1000*l.* a year, issuing out of lands, for her jointure and in bar of dower. The marriage is had, and *A.* by his will devises to his wife certain parts of his real and personal estate of considerable value; held that she was entitled both to the estates devised, and to her annuity, and that the one was not intended as a satisfaction for the other. *Vol. 7. pa. 12.* *Sir Thomas Broughton v. Errington.* 1773.

3. To make a devise or bequest a satisfaction for a collateral demand or performance of a prior contract, it must be *ejusdem generis*, and not land for money, or money for land, or must at least be of

of such certain and known value and estimation, and so far of the same nature of the thing to be satisfied therewith as to appear indisputably to be equivalent, or superior, not only in gross value, but in annual income, to the debt or demand, or the thing to be performed. *Vol. 7. pa. 12. May 1773. Broughton v. Errington.*

4. *R. B.* on his marriage, settled exchequer annuities for ninety-nine years, amounting to 300*l. per annum*, in trust to himself for life, remainder to his wife for life, remainder to his children, in such manner as he should appoint; by the marriage there was only one child, a daughter. *R. B.* devised all his real and personal estate to his wife and her heirs, charged with 10,000*l.* to his daughter, payable at 18. After the death of *R. B.*, the wife makes her will, and gives all her real and personal estate to her daughter and her heirs; but if she die before she was of age to dispose thereof, then to trustees to raise 6000*l.* for a charity; the residue thereof, if the daughter dies unmarried, to the sisters of the testatrix. The daughter, after the mother's death, marries the plaintiff, has issue a daughter, and dies about the age of 20; the plaintiff, as representative to his wife, and in his own right, brings a bill for an account of the real and personal estate of *R. B.* and wife; the daughter was entitled under the settlement to the exchequer annuities, and the devise of the 10,000*l.* to her shall not be taken to be in satisfaction of them. 1 *Atk.* 426. 1737. *Belasis v. Utb watt.*

5. Sir Samuel Garth having upon his daughter's marriage given a bond to leave 5000*l.* at his death among her younger children, by will creates a term for years in trust to apply the rents and profits for the maintenance of his daughter's children till 21, and also gives his personal estate in trust to pay the produce thereof to his wife for life, and after her death to pay 1500*l.* to *A.*, one of the daughters of his daughter, and 3500*l.* among the other younger children of his daughter, as he shall appoint, and if no appointment, equally between them at 21 or marriage; and declares the legacy shall be in full satisfaction of the bond: she must elect to claim under the will, or under the bond, the one being a satisfaction for the other; but the Lord Chancellor said, he would not extend the construction of devises in satisfaction further than they had gone already, and decreed after-born children to have their share under the bond. 1 *Atk.* 509. 1739. *Groves v. Boyle.*

6. A less sum given under a will than under a settlement, is not a satisfaction of a greater. 2 *Atk.* 57. 1740. *Phipps v. Annesly.*

7. Mr. Justice Tracy held that the lands of which *J. S.* was seised in fee, and devised to his daughters in tail, not such an estate of inheritance as will be a satisfaction of the portions for his daughters by the second wife, because they claim these lands by purchase, and the proviso in the marriage settlement restrains the satisfaction to lands coming to the daughters by descent from their father. 2 *Atk.* 458. 1720. *Lady D. Saville v. Sir G. Saville.*

8. A father, administrator *durante minore etate* of his daughter, who was executrix and residuary legatee of her grandmother's estate,



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estate, agreed when she married with the plaintiff, that he should have 800*l.*, which in the settlement is called a portion: Lord *Hardwicke* Chancellor refused to decree an account of the grandmother's personal estate as she had been dead 20 years, but directed that the father's representative should account for his personal estate as to the 800*l.* only, and interest at 4*l.* *per cent.* from the marriage. 2 *Atk.* 521. 1742. *Wood v. Briant.*

9. Where a husband by a settlement before marriage was obliged to do a particular thing for the benefit of the wife, and he did a thing equally satisfactory, the court will presume a satisfaction by implication. 2 *Atk.* 632. 1742. *Weyland v. Weyland.*

10. The presumption of satisfaction is stronger in the case of a deed than of a will, where a bounty is supposed to be intended. *Ibid.* 634.

11. *W.* on his son's marriage, settled 5000*l.* old and new annuities on him for life, then on *W.*'s wife for life, remainder to his son for life with remainder to his intended wife for life, with remainder to the issue of the marriage; not only so much as his estate for life in these annuities is valued at, but the whole 5000*l.* must be brought into hotchpot before the son can be admitted to a share of *W.*'s personal estate, who died intestate. *Ibid.* 635.

12. Covenant by deed after marriage to settle on the wife, if she survive, part of the real estate for her jointure, and in full recompence of all dower and thirds which she can any way claim out of any lands of which he is or can be seised of freehold or inheritance, she is thereby barred from claiming as her *freebench* copyhold purchased afterwards. 1 *Ves.* 54. 1747. *Walker v. Walker.*

13. Whether the heir at law is entitled to performance of a covenant in marriage articles to purchase and settle lands, and how far the covenant was satisfied: *the cause was compromised.* 1 *Ves.* 274. 1749. *Lewis v. Hill.*

14. *A.* agrees to settle 100*l.* *per ann.* on his intended wife, but falling sick, he devises 100*l.* *per ann.* to her; recovering, marries her and the settlement is carried into execution. She can take but 100*l.* 1 *Ves.* 323. 1749. *Mascall v. Mascall.*

15. Devise of a residue of real and personal for life not a satisfaction for a sum to be laid out in lands in fee by articles. 2 *Ves.* 37. 1750. *Alleyn v. Alleyn.*

16. Lands devised to wife, not a satisfaction of a covenant in marriage articles, that lands settled on her, were of such a value. 2 *Ves.* 409. 1752. *Serjt. Prime v. Stebbing.*

17. Bill by plaintiff for a performance of articles entered into by his father, *Richard Pinnell*, deceased, before marriage, by which he was to purchase and settle on his wife, and the issue male of the marriage, lands of inheritance of the clear yearly value of 500*l.* The father afterwards purchased some estates, and by will, not duly attested, reciting the marriage articles, directed lands of the yearly value of 190*l.* to be bought, which, together with

with his estate at *Mitcham*, let on lease at 180*l.* a-year, the moiety of a house in *Idol-lane*, and his copyhold estate called *Marlford Farm*, &c. he bequeathed to his wife, without impeachment of waste, remainder to the uses of the articles. Question, Whether all or which of these estates are applicable in part satisfaction to the covenant? The Lord Chancellor was of opinion, that the moiety of the house was not, because it was not the kind of estate mentioned in the articles; 2dly, that the copyhold estate was not applicable, because the wife was to take the estates settled for life *without impeachment of waste*. And with respect to the *Mitcham* estate, the rent of which had fallen to 150*l.* a-year, an inquiry was directed as to the yearly value of that estate at the death of the testator, at which time it became a satisfaction *pro tanto*; but if it had been purchased at the time of the marriage articles, the value should have been taken as at that time. *Ambl.* 106. 1751. *Pinnell v. Hallett and others*, 2 *Ves.* 276. S. C.

18. Declaration in a deed of settlement providing portions for daughters, that if any lands should come from the father, they should be taken as part of the portions; an estate tail being devised by the father, was considered as a part satisfaction according to the value of it. *Watson and another v. Earl of Lincoln and others*, *Ambl.* 328. 1756.

19. A provision by marriage settlement, with a proviso, that sums advanced should go in satisfaction, unless otherwise declared; 4000*l.* left by will, subject to the life of the mother, and the residue of the personal estate being given by the will to a child entitled to the provision under the settlement, must go in satisfaction of that provision. *Richman v. Morgan*, 1779. 1 *Bro. Ch. Ca.* 63 — Vide 2 *Bro. Ch. Ca.* 394.; *Watson v. Lord Sondes*, and *Pugh v. the Duke of Leeds*, March 1780. 1 *Bro. Ch. Ca.* 66. *in notis.*

20. By marriage settlement, part of the wife's fortune was advanced to the husband for the purposes of his trade, for which he secured her an annuity, the rest being settled upon the children after the decease of the husband and wife, in such proportions as the wife shall direct: by will he directed, that the wife should relinquish her claim under the settlement, and left a larger sum to trustees, the interest to be paid to her while sole, with a power to her to dispose of the whole among the children. This is a satisfaction for their portions under the settlement. 1 *Bro. Ch. Ca.* 82. 1780. *Moulson v. Moulson*.

21. Bond on marriage to secure 300*l.* (the wife's fortune) to the wife, within one month after the husband's decease, by will the husband gave her 500*l.* payable within six months after his decease, together with other legacies. The bequest of 500*l.* is not a satisfaction for the 300*l.* secured by the bond. *Haynes v. Mico*, Mich. 1781. 1 *Bro. Ch. Ca.* 129. — Vide *Cantle v. Morris*, lb. 133. *in notis.*

22. By a marriage settlement 10,000*l.* were to be raised for younger children; the settlor by will gave the younger children

2000*l.* each; this is a part satisfaction. 1 *Bro. Ch. Ca.* 305. *Warren v. Warren.* July 1783.

23. Leasehold estate settled "in lieu of dower," is not a bar of thirds. 3 *Bro. Ch. Rep.* 362. 1791. *Creswell v. Lord Byron.*

24. A covenant is satisfied by suffering property to go to as to produce the same effect; thus lands suffered to descend are a satisfaction of a covenant to purchase. 2 *Ves. jun.* 356. 1794. *Wilson v. Piggot.*

25. Covenant in marriage articles by the husband to pay his wife, if she should survive, 200*l.* as a jointure, and 50*l.* to provide herself with a house yearly for life: afterwards by will he gave her for life an estate and house above the value of 100*l.* a year, with the household goods, &c. and an annuity of 100*l.*, commencing and payable at different times from those in the articles. Held not a performance, nor intended as a satisfaction. 2 *Ves. jun.* 463. 1794. *Richardson v. Elphinstone.*

26. Covenant to leave a sum of money, which is not done, but personal estate is permitted to descend, so that an equal or greater sum would go according to the covenant. This is a performance. *Ibid.* 464.

27. Portions for children by the will of the parent presumed a satisfaction of a prior provision by settlement, unless clearly not so intended: the presumption is not rebutted by slight circumstances. 3 *Ves. jun.* 516. *Hinchliffe v. Hinchliffe.* Aug. 1797.

28. Portions for children by the will of the parent held a satisfaction of a provision by settlement, upon the intention: slight circumstances of difference, that would repel the presumption of satisfaction between strangers, are not sufficient in the case of parent and child. 3 *Ves. jun.* 530. *Sparkes v. Cator.* Aug. 1797.

29. Settlement previous to marriage of the wife's fortune on herself, with a covenant by the husband, in consideration of the marriage, &c. and for making some provision for the wife and her issue, to pay within three months after his death 6000*l.* to the trustees in trust, if the wife should survive him, and there should be no issue, (which was the event) to pay 1500*l.* to the wife, her executors, &c., and to pay the interest of the remaining 4500*l.* to her for life: she is entitled to dower; and her share under the statute of distributions is not a satisfaction or performance of the covenant. 4 *Ves. jun.* 391. *Couch v. Stratton.* Jan. 1799.

25 Vin. 282. (W) Agreements unperformed decreed upon what Evidence.

1. COVENANT by deed before marriage to settle on the wife, if she survive, part of the real estate for her jointure, and in full recompence of all dower or thirds which she can any way claim out of any lands of which he is or shall be seised of freehold of inheritance, she is thereby barred from claiming as her *free bench*

*bench* copyhold purchased afterwards. 1 *Ves.* 54. 1747. *Walker v. Walker.*

2. Query, Whether an heir at law is entitled to performance of a covenant in marriage articles to purchase and settle lands, and how far the covenant is satisfied. 2 *Ves.* 274. 1749. *Lewis v. Hill.*

3. *A.* on marriage covenants to buy land of the clear yearly value of 500*l.* and settle; and by his will he directs that a moiety of a house and a copyhold estate should be taken as part: held they should not, on bill for the performance of the articles. *Ambl.* 106. 1752. *Pinnell v. Hallett.*

4. Lands by will directed to be taken as part performance of covenant to settle, having sunk in their value, ordered to be taken at the rents as they stood at the testator's death. *Ibid.*

5. If a settlement be just in general, a particular advantage on one side or the other will not affect it. 2 *Atk.* 520. 1742. *Middlecome v. Marlow.*

6. Informal marriage agreements decreed notwithstanding the statute of frauds upon acquiescence and acts in consequence, though not signed by one party, or though an infant. 2 *Ves.* 524. 1754. *Archer v. Pope.*

7. Leasehold estate settled "in lieu of dower" is not a bar of thirds. 3 *Bro. Ch. Ca.* 362. 1791. *Creswell v. Byron.*

8. Settlement decreed according to a letter previous to the marriage, though no express assent: the marriage having taken place immediately, a distinct, positive dissent would be necessary to prevent the effect of the letter; and that could be evidenced only by an actual settlement before marriage. Construction as to vesting in what children and when; and as to the subject upon which the settlement was intended to attach. 4 *Ves. jun.* 501. 5 *Ves. jun.* 213. S. C. 1799. *Luders v. Anstey.*

9. Articles before marriage for settling real estates of the husband, and also all and singular his personal estate of what nature or kind soever; a proper execution would be by a covenant that real estate that should be purchased with the personal should, with respect to the objects of the settlement, be considered personal: the settlement therefore made after marriage containing no such covenant, and being in other respects a defective execution, real estates purchased by the husband, according to the evidence in order to defeat the right of his wife, were decreed to be conveyed by his devisee according to the articles. A gift by him in his life in consideration of service was not disputed; but under the particular circumstances attending the marriage, and in the case of an infant, the court appeared to question its validity. 5 *Ves. jun.* 262. 1800. *Randall v. Willis.* See also 1 *Fonbl. Treat. Eq.* 200.

11 Vin. 285. (X) Agreements decreed. How as to the Limitations, &c. to be made upon.

1. SON not in being cannot take less than an estate tail. 2 *Ves.* 568. 1754. *Hucks v. Hucks.*

2. In marriage articles a limitation to the first son and to the first son of such first son, is an estate tail to the first son. *Ibid.*

3. Settlement to such uses as the husband and wife shall jointly appoint, and in default of such appointment to them for life; and after the decease of the survivor to the use of all or any of the child or children of them, in such shares and proportions, and for such estate and estates, term or terms, and payable at such time or times and in such manner and form as the husband should by deed or will appoint, and in default thereof to him and his heirs. The event, upon which the last limitation depends, is default of appointment, not of children. 5 *Ves. jun.* 596. 1800. *Barstow v. Kelvington.*

4. Sir Robert Fagg and his son Robert, by articles made on the marriage of the son, covenanted for themselves, their heirs, executors, &c. to settle lands to the following uses: as to one part of the value of 820*l.* *per annum* to the son for life, and after the determination of that estate to raise a jointure of 400*l.* a-year rent-charge for the wife, and then to trustees to preserve contingent remainders to sons in tail male, afterwards to sons by any other marriage, and there was no other limitation; then as to other part of the estate, the uses of which were limited to the same persons as the first mentioned lands, with a charge by way of additional portion of 4000*l.* for Sir Robert Fagg's daughters, and after several limitations, "to the plaintiff Lady Goring and her heirs male, unless Sir Robert Fagg should appoint other uses under his hand and seal, then a limitation to other daughters in tail; then to Mr. Fagg of Grimby, and then to Sir Robert's right heirs." The father died, leaving the son surviving, the son died without having carried the articles into execution, the legal estate in some of the lands descended on the four sisters in fee as heirs both of the father and brother; Sir Charles Goring and his lady, one of the daughters of Sir Robert Fagg, filed a bill to have the articles carried into execution, and to have the entail of the estate so limited as aforesaid, settled accordingly: and the court decreed the same. 3 *Atk.* 186. 1744. *Goring v. Nash.*

5. A specific performance of marriage articles has been decreed even as to collaterals. *Ibid.* 189.

(Y) Agreements decreed how; upon Limitations 11 Vin. 286.  
contained in the Covenant.

1. **C**OVENANT by husband to assign a contingent portion of the wife to the uses of the marriage. The right of calling for it vests in the husband, who dies without doing so. The wife is bound by this covenant. 1 *Ves.* 19. 1747. *Bush v. Dalway.*

2. Covenant in an infant's marriage settlement, that whatever should come to the wife from the mother or otherwise shall be bound by the settlement restrained to what shall come from the mother, not to property coming unexpectedly from other quarters. To bind an infant the marriage settlement must be fair and reasonable, not tend to deprive her of every thing. 1 *Br. Ch. Ca.* 152. 1782. *Williams v. Williams.*

3. Covenant in a marriage settlement to settle leasehold estates in trust for such persons, and such or the like estates, ends, intents, and purposes, as far as the law would allow as declared concerning real estates, limited to the first and other sons in tail male, with several remainders: the court, in executing the covenant, declared that no person should be entitled to the absolute property unless he should attain twenty-one, or die under that age leaving issue male. 3 *Ves. jun.* 387. 1797. *The Duke of Newcastle v. The Countess of Lincoln.*

(Z) Settlement Construction, how much.

11 Vin. 287.

1. **U**NDER marriage articles 2000*l.*, part of 3000*l.* vested in trustees, is to be paid to such son as shall live to attain the age of 21, when and at such time as he shall have attained his age of 23: held that he became absolutely entitled to the money, and the time of payment only was postponed to the age of 23. 2 *Atk.* 185. 1741. *Combe v. Combe.*

2. By articles made on the marriage of plaintiff's father and mother, it was agreed that the sum of 1000*l.* should be paid to a trustee, and the sum of 300*l.* secured to him in trust, to permit the plaintiff's father to receive the interest and dividends for his life, and after his death to permit the wife to receive the interest thereof for her life; and after the death of the survivor, if they should have a son, or one or more younger children, sons or daughters, then upon trust to pay the said principal sums to such younger children, if but one, if more, then to be equally divided between them; and it was covenanted that the plaintiff's grandfather should procure his sister *Frances Flatman* to convey all her interest in certain houses to the use of herself for life, to plaintiff's mother for life, then to her younger child or children in tail general, remainder to the plaintiff's mother in fee. By lease and release,

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bearing even date with the articles, the said houses were settled to the same uses with the articles. The father and mother died, leaving the plaintiff their daughter and *eldest* child, and also a son: the plaintiff is entitled to the said sums of 1000*l.* and 300*l.*, and also to the said houses, the rule being, that where there is a son an *eldest* daughter is considered as a younger child, which was the intention of the parties, the articles and the release being taken together. 2 *Atk.* 456. 1742. *Heneage v. Hunlocke.*

3. *Elizabeth Burnaby*, by an agreement made on her father and mother's marriage, was entitled to 6000*l.* Mr. *Burnaby*, just before his marriage, signed a paper whereby he agreed that every thing which should come to *Elizabeth* by her father's death, should go to them for their respective lives, and after the death of the survivor to the heirs of the body of *Elizabeth* by him begotten; as this was a limitation to the heirs of the wife, it vested in her only, and the husband consenting, the court decreed the 6000*l.* to be settled on her and her children. 2 *Atk.* 474. 1742. *Green v. Ekins.*

4. An estate was limited under a settlement to the father for life, then to secure a rent-charge of 800*l.* per annum to his wife for life, remainder to trustees during the life of the father to preserve contingent remainders, remainder to the first and every other son of *J. S.*, remainder to the brother of *J. S.* The plaintiff was born after the next rent day had arrived after the death of *J. S.* his father, and was held entitled under the 10 and 11 of *W.* 3. to the intermediate profits of the lands settled as well as to the lands themselves. But as to descended estates, the posthumous child held entitled to the profits from his birth only. *Basset v. Basset*, December 1744. 3 *Atk.* 203.

5. Limitation in a settlement "to the use of all and every child and children other than such as shall be heir at law," if there had been only one child it would have been excluded, if there had been several daughters they would have been excluded, or if there had been several sons and daughters, and reduced only to one child, that child could not have taken. 3 *Atk.* 338. 1745. *Lord Townsend v. Ash.*

6. A posthumous child is within a provision in marriage articles for such children of the marriage as should be living at the death of the father or mother. 1 *Ves.* 85. 1747-8. *Millar v. Turner.*

7. When the issue of the marriage is not entitled to have the estate settled on the marriage, disencumbered out of their father's estate. 1 *Ves.* 100. 1748. *Clack v. Samson.*

8. On marriage, a leasehold estate was settled in trust for the husband and wife for life; after the decease of the survivor, then to trustees, to assign it with the rents and profits to the eldest son: for want of such issue of such son or daughters, it goes to the only daughter on the mother's death, and not to the representatives of a son, who died without issue in the mother's lifetime. 2 *Ves.* 118 and 318., *Exel v. Wallace.*

9. Settlement of 10,000*l.*, the interest to be paid to husband and wife for their lives, the principal subject to the appointment of the husband, and then of the wife to any of the children; and in default of appointment, to all their children equally at 21, or marriage; there were two children, one died in the lifetime of the father; there was no appointment; the father died: held to be a contingent vested interest in the children, and the survivor was entitled to the whole after the death of the mother. *Ambl.* 364. 1758. *Gordon v. Levi.*

10. Settlement of money on husband and wife, &c. and if the husband die, and the wife survive, he leaving no issue of her body, or such issue die in the lifetime of the wife, then the money to go to the wife; there was issue a daughter, who attained 21, and died in the lifetime of her mother: held the daughter took a vested interest. *Ambl.* 621. 1764. *Heurtley v. Mason.*

11. Trust under marriage settlement for the next of kin of the wife, subject to her appointment by will with two witnesses: appointment in favour of the husband by an unattested will being void, the children are entitled, not the husband, who is not of kin to his wife, and whose claim to her personal property is not in that character under the statute, but *jure mariti*; and in this case according to the plan of the settlement, he was not intended. 3 *Ves. jun.* 244. 1796. *Watt v. Watt.*

## (B. a) Lien. Where the Covenant is a Lien on the Land. 11 Vin. 232.

1. *A.* Covenants on his marriage to lay out 3000*l.* in the purchase of land, and to settle it on *A.* in tail, remainder to *B.* *A.* purchases the manor of *D.* with this 3000*l.* and never settles it, but suffers a recovery thereof; as the covenant was a lien on the land; so the recovery suffered of it discharges the lien, and bars *B.* of the benefit of the covenant, and of the remainder. 3 *P. Wms.* 171. 1732. *Marwood v. Turner.*

2. *N.*, the mother of *A. S.*, was seised in tail *ex provisione viri* of the estate in question, reversion in fee to her husband; *A. S.* and *W. S.* her husband created a mortgage term of 1000 years on his estate, and joined in levying a fine to the mortgagee, remainder to such uses as *W. S.* should appoint. *W. S.* before the levying the fine, on sale of an estate belonging to him, covenants with *J. S.* the purchaser for quiet enjoyment, and afterwards makes an appointment to trustees for particular purposes of the wife's estate; *J. S.* being evicted of the lands he purchased, brings his bill against *A. S.* and her four children, to subject her estate to the plaintiff's demand under the covenant of *W. S.* It being a doubtful case whether the plaintiff's debt accrued by breach of covenant till after the appointment of *W. S.* in execution of the power, the bill was dismissed. 3 *Atk.* 419. 1746. *White v. Sansom.*



3. A covenant to appropriate one-third of the produce of a real estate to raise a sum of money, is not a mere personal covenant enforceable at law, but creates a lien upon the land, and the covenantors are entitled to have it specifically performed. *Legard v. Hodges, East. 1792.* 3 Bro. Ch. Ca. 531. 1 Ves. jun. 477. S. C. August 1793. 4 Bro. Ch. Ca. 421. S. C.

4. A covenant to settle or convey particular lands will not at law create a lien upon the lands; but in equity such a covenant, if for a valuable consideration, will be deemed a specific lien on the lands, and decreed against all persons claiming under the covenantor, except purchasers for valuable consideration, and without notice of such covenant. *Finch v. Earl of Winchelsea, 1 P. Wms. 282.* *Freemantle v. Dedere, 1 P. Wms. 429.* *Jackson v. Jackson, 4 Bro. Ch. Rep. 462.* *Coventry v. Coventry*, best reported at the end of *Francis's Maxims*; for equity considers that as done, which being distinctly agreed to be done, ought to have been done. *Grounds and Rudiments of Law and Eq. page 76. and Fonbl. Treat. Eq. 367.*

11 Vin 290.

### (C. a) Covenants Lien on the personal Estate.

1. *A.* Covenants for himself and his heirs, that he will purchase lands and settle them on himself for life, remainder to his wife for life, remainder to his first, &c. son, remainder to himself in fee; equity will compel the executor to lay out the money, though the heir is both debtor and creditor. 3 P. Wms. 224. 1733. *Lechmere v. Earl of Carlisle.*

2. Bond by an infant for a just debt: his mother and infant sister being entitled, on the death of *A.* without issue, to 400*g*l. stock for the mother for life after to her children according to appointment, if no children to the mother, after the death of the son covenant to pay that debt, when either should become entitled to that stock. On the marriage of the daughter, the mother made an appointment of the stock in her favour; but the next day the husband having notice of, and approving the covenants to pay the son's debt, and reciting his, and his wife's intention to secure it "as after mentioned," released all their right to that stock to the mother, and covenanted that when the wife should be 21 all their interest should be vested in her; and a trust was declared, that if the obligee should have a right to recover that debt, it should be paid out of that stock. Afterwards a bill being filed to set aside the settlement, as an appointment by the mother for her own benefit without consideration, the parties were by agreement mutually released from the covenants in it, and the husband covenanted that if the obligee should have a right in the life of the mother to recover the debt, it should be paid out of that stock. The mother died intestate before *A.* It was held that a fair assignee of the debt had no specific lien on the fund, which could be

be liable only by being brought back into the mother's assets as taken out in fraud of her creditors; for which it must be said either that there was no pretence for the compromise, or no pretence for its providing for the debt only if suable in the mother's life; but the marriage brocage in the settlement was sufficient ground for the compromise, and the bill did not go on the other ground; therefore the common decree for an account of assets, debts, and funeral expences, without reference to that fund, was made against the husband and wife as administrators. The debt of the son was a sufficient consideration for the covenants; and if the mother had survived *A.* there would have been a specifick lien. 1 *Ves. jun.* 314. 1791. *Johnson v. Boyfield.*

(D. a) Portions to be paid, or Settlements to be made on Condition precedent. 15 Vin. 291.

**S**ETTLEMENT on two daughters; proviso, if either marry without the consent of their mother, it should be to their separate use, &c.; the mother proposed, and encouraged the marriage of one of her daughters with Lord *Strange*, and afterwards refused her consent out of pique and resentment; the marriage was had without her consent, and held not forfeiture. *Ambl.* 263. 1755. *Lord Strange v. Smith.*

(E. a) Settlement. Variance between Agreements, Articles, and Settlements. 15 Vin. 291.

1. **W**HERE by articles an estate is limited to *A.* for life, to his wife for life, remainder to the heirs of the body of *A.*: this is considered here as an estate for life only in the father, and the settlement after shall be rectified by the articles before marriage; but though this has been done between parties to the articles and settlement and their representatives, and mere volunteers, yet not against a purchaser. 3 *Atk.* 291. 1745. *Warwick v. Warwick.* 1 *Atk.* 17.  
2 *Atk.* 85.

2. Articles and settlement in pursuance, and in the very words thereof, both before marriage, under which the husband would be tenant in tail, will be rectified in this court for the son. 1 *Ves.* 238. 1749. *Roberts v. King/By.*

3. The court refused to rectify a settlement which varied the interest of an adult from what it appeared to be under the articles. *Ambl.* 315: 1756. *Partyn v. Roberts.*

4. Articles before marriage to settle were so expressed, that the husband would have had an estate tail; a settlement copying the very words of the articles was reformed. 5 *Ves. jun.* 262. 1800. *Mandall v. Willis.*

## Marriage

5. Settlement reformed in favour of the younger children, against the heir of the mother, claiming the reversion, by a letter from her on the marriage of her daughter, stating the intention. 5 *Ves. jun.* 593. Aug. 1800. *Barflew v. Kelvington*.

## Master of the Rolls.

15 Vin. 349.

### (A) His Power, &c.

HIS Honor directed a case to the Court of King's Bench, saying he thought he had authority when sitting for the Chancellor, which was the case then, though not when sitting at the Rolls. 2 *Bro.* 88. 1786. *Horton v. Whitaker*.

## Master of a Ship.

15 Vin. 344.

### (B) Chargeable. In what Cases.

1. **W**HERE several bills of lading, of different imports, have been signed, no reference is to be had to the time when they were signed by the captain; but the person, who first gets one of them by a legal title from the owner or shipper, has a right to the consignment. And where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted *bonâ fide*, a delivery according to such legal title will discharge him from them all. *Caldwell et al. v. Ball*, 1 *Term Rep.* 205.

2. Where goods are ordered for a ship by the owners, before the appointment of the captain, though some are not delivered till afterwards, yet as no personal credit is given to the captain, he is not answerable for any of them. *Farmer v. Davies*, 1 *Term Rep.* 108. *Vide also Hoskins v. Slayton*, *Caf. Temp. Hard.* 376.

3. The person who repairs a ship has his election in a court of common law, either to sue the master who employs him, or the owners, but if he undertakes it on a special promise from either, the other is discharged. *Garnham v. Bennett*, 2 *Str.* 816.

4. The demand in Chancery was for work done in repairing a ship. The defendants were part owners, or their representatives, who received the benefit thereof. *Per Lord Hardwicke, C.* The

questions are two; first, whether the part owners, by the employment of the plaintiff either by the master or the husband, are become personally liable for the debt created and contracted for the repairs? 2d, whether, supposing they are not, the ship itself has contracted a lien by the admiralty law allowed here; and then, whether the money arising by the sale is answerable to the plaintiff? Upon the last question, his lordship said, certainly, by the maritime law the master has power to hypothecate both ship and cargo for repairs, &c. during the voyage, which arises from his authority as master, and the necessity thereof during the voyage; without which both ship and cargo would perish: therefore both that and the law of this country admit such a power. But it is different when the ship is in port *infra corpus comitatus*, and the contract for repairs, &c. made in *England*, then the rule of that law must prevail. I know of no case where the repairs, &c. whether it was by part owners or sole owners, master or husband, have been held a charge or lien on the body of the ship, *Watkinson v. Barnard*, 2 P. Wms. 367. being a direct authority to the contrary; and if the ship in the river *infra corpus comitatus* should be proceeded against for such debts, the courts of law would issue a prohibition, the contract being at land, and not arising from necessity. If, therefore, the body of the ship is not liable or hypothecated, how can the money arising by sale be affected or followed, the one being consequential of the other? He dismissed the bill therefore so far as it sought relief against the body of the ship, or the money arising by the sale thereof; but feeling doubts on the other point, he directed that the plaintiff be at liberty to bring an action against the survivors, and restrained the defendants from pleading the statute of limitations, or from insisting upon any discharge under a commission of bankruptcy against one of them. *Buxton v. Snee*, 1 Ves. 154.

5. But a master having pledged a ship for the expences, &c. laid out upon her abroad, the question was, whether the part owners were liable? and *Thomas v. Terry*, Eq. Ab. 139., *Speering v. Degrave*, 2 Vern. 643. were cited. Sir John Strange, Master of the Rolls, observed that the case in *Vern.* seemed to be a transaction at home, and it was common that if materials were furnished by tradesmen, they might bring an action against either \*. But his Honor, after taking time to consider, determined that the ship was well hypothecated, and that part owners were liable. *Sansum v. Bragington*, 1 Ves. 443.

\* *Quere.*  
Whether  
the ship or  
captain is  
meant here-  
by as liable,

as the owner, &c. is in the other. See the distinction taken in the following case.

## (B. 2) Owners. How far bound by his Contract or Default. 15 Vin. 348.

1. WHOEVER supplies a ship with necessaries has a treble security. 1. The person of the master, as making the contract. 2. The specific ship. 3. The personal security of the owners, *Note, But in Westdale v. Dale*, 7 Term Rep.

B. R. 312. owners, whether they know of the supply or not, for they are  
 Lord Ken- liable for the master's act, because they chuse him. *Per Lord*  
 yon C. J. *Mansfield C. J. Rich v. Coe et al., Cowp. 639. Farmer v. Davies,*  
 said, "I doubt whe- 1 Term Rep. 108.

ther that doctrine is not too generally laid down." Sir J. Jekyll held in a case before him, that the master could not subject the ship if in England; and that was confirmed by Lord Hardwicke.

2. Though the master of a vessel be also lessee of it, by agreement with the owners for a term of years, under covenants on their part that he shall have the sole management of the ship, and employ her for his own sole benefit, &c., and on his part, that he shall repair her at his own sole cost and charge, &c. The owners are still liable for necessities furnished for the ship by order of the master, though without their knowledge; or without their being known to the person who supplied them. *Rich, Executor, v. Coe et al., Cowp. 636.*

3. In trover for a quantity of dollars shipped by the plaintiff on board defendant's vessel, and taken by force by fresh water pirates from on board the ship as she lay at anchor in the Thames. Evidence being given that one of the mariners was accessory to the robbery by giving intelligence, and afterwards shared in the spoil, the court of B. R. were of opinion that the owners of the ship were not liable for more than the value of the ship and freight under 7 G. 2. c. 15. *Sutton v. Mitchell, 1 Term Rep. 18.*

4. In the case of a ransom bill the owners are not liable beyond the value of the ship and cargo. *Hetty v. Grant, cited 1 Term Rep. 76.*

See 6 Mod.  
37.

5. A promise by a captain of a ship on the part of his owners when the ship was taken to pay monthly wages to one of the sailors, in order to induce him to become an hostage, is binding on the owners though they abandon the ship and cargo. *Yates v. Hall, 1 Term Rep. 73.*

6. The owner of the ship is liable to the freighter for the default of the master, though the freight was to go to the master, either by special agreement of the owner or by the custom of the trade, and though it were in a trade unlawful in the foreign country whence the goods were shipped, but lawful in England. *Boucher v. Lawson, Cas. Temp. Hard. 85. 194.*

7. But it must be charged upon the custom of the realm, as in a ship usually carrying for hire, or on the personal undertaking of the owner; and in a special verdict this must be specially found; upon a general verdict it is presumed. *Ib.*

8. A, the owner of a ship, lets it to B. for a voyage for a sum certain, B. to have the benefit of carrying goods, and A. covenants for the condition of the ship and the behaviour of the master, C. sends gold and has bills of lading signed by the master, A. is liable and not B. *Parish v. Crawford, Str. 1251.*

## (D) Actions against him.

15 Vin. 348.

**T**ROVER by the assignees of a bankrupt for a ship of which the bankrupt was owner, against the captain. The defence set up was that the captain had a *lien* on the ship for his wages, and for stores, provisions, and repairs done in *England*, and paid for by him after the demand by the assignees. A verdict being found for the defendant, the court were of opinion upon a case reserved, that it was clear the captain had no *lien* for his wages; and though he had made himself liable to the different tradesmen for repairs, &c., and might hypothecate the ship for them in foreign ports, yet he had no *lien* for them upon it when they were done in *England*; for he need not have made himself liable, and would, not if he had professed to act as agent for the owner; and he cannot now be in a better situation by paying than the tradesmen whom he paid, and who had no *lien* for provisions furnished; and if they had one for repairs, had parted with it by parting with the possession of the ship. *Wilkins & al. Assignees of Brooke v. Carmichael, Dougl. 97.*

## Master and Servant.

[A]

## (A) With respect to others.

15 Vin. 308.

1. **W**HERE the defendant, after the bankruptcy of *A. B.* laid out part of the property of the bankrupt in buying *India* bonds, and delivered them to the wife of the bankrupt; the assignees having seized part of the bonds thereby confirmed his act as agent for the estate, and cannot afterwards sue him for the money with which the other bonds were purchased. *Wilson v. Poulter, 2 Stra. 859.*

2. It was held by *Lee, Ch. J.* that though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt. *Paterfon v. Tash, 2 Str. 1178.*

3. Where, by the custom of a trade, the factor was responsible to the owner for the payment by the vendee, the jury thought that the vendee was not liable to be sued by the owner, but only by the factor. Their verdict was set aside; but a second being given to the same effect (though contrary to the directions of the Judge,) seems to have been acquiesced in. *Scrimshire v. Alderton, 2 Str. 1182.*

See tit. *Bill of Lading.*

See tit. *passim.*

4. Where money was paid to an agent by mistake, and placed by him to the account of his principal, and a balance struck thereupon, but the money *not paid over*, nor any new credit given by him in consequence thereof till after notice of the mistake, the agent was held liable to an action for money had and received to the use of the person paying it. *Buller v. Harrison, Cowp. 565.*

5. Where the defendant, as agent for the crown, had employed the plaintiff in public services, he was held not to be personally responsible. *Macbeath v. Haldimand, 1 Term Rep. 180. S. P. Unwin v. Walseley, 1 Term Rep. 674.*

6. A broker with a commission *del credere* was allowed to set off a loss upon a policy of insurance happening before a bankruptcy, to an action by the assignees against him for several premiums on policies underwritten by the bankrupt, and for which he had debited the broker; for in these commissions the broker is liable to the principal in the first instance. *Grove v. Dubois, 1 Term Rep. 112. S. P. Bize v. Dickson, 1 Term Rep. 285.*

7. Where an agent was employed to buy goods, his acknowledgment of having received them was held evidence of a delivery to the buyer, without the plaintiff's being obliged to call the agent as a witness. *Biggs v. Lawrence, 3 Term Rep. 454.*

8. The holder of a bill of exchange desired *A.* to get it discounted, but positively refused to indorse it, and *A.* delivered it to *B.* for the same purpose, informing him to whom it belonged, and *B.* finding that he could not dispose of it without indorsing it, was prevailed upon to do so by *A.*'s telling him that he would indemnify him; but the indorsee took it upon the credit of the names on the bill, without any knowledge of the real owner; although such original holder afterwards promised to pay the bill, yet such promise was held not to support an action against him by the indorsee, it being *nudum pactum*; for as *A.* was a special agent under a limited authority, he could not bind his principal by any act beyond the scope of such limited authority. *Fenn v. Harrison, 3 Term Rep. 757.*

9. But it appearing on a new trial that the holder did not refuse to indorse the bill, the court thought this variation material, and the plaintiff had judgment. *4 Term Rep. 177.*

10. The fraud of the agent vitiates a transaction, for the advantage of the principal although he do not personally assist in it. *Doe v. Martin, 4 Term Rep. 68. S. P. 1 Term Rep. 12.*

For more cases as to *Agents, &c.* see *Assurance, Possession, Bill of Lading*, and other proper titles.

15 Vin. 309.

### (K) Inter se.

WHERE in an action for a libel and slanderous words, in which the defendant did not justify, but pleaded the general issue, it appeared that the publication was only in giving a character of the plaintiff his servant, and the court held that he could not

not recover without proving the words to have been *false* and malicious. *Weatherstone v. Hawkins*, 1 Term Rep. 110.

(O) Actions by the Master on account of the Servant. 15 Vin. 325.

1. **A**N action will lie for continuing to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master or know when he employed him that he was the servant of another. *Blake v. Lanyon*, 6 Term Rep. 221.

2. Trespass on the case will lie for enticing away a journeyman, who works by the day or piece, before his work is finished. *Hart v. Aldridge*, 1 Cowp. 54. In an action for enticing away or retaining or  
employing a servant, it is advisable to give notice to the intended defendant, that the party is servant to the plaintiff, and to demand him: and proving such notice, and a subsequent employment during the time for which the plaintiff hired, retained, took, and engaged the servant, will entitle the plaintiff to a verdict. To this proof must be added proof of the contract between the master and the servant, and that the time was not expired.

3. Where a person was so hired to work at a trade for a limited time, under a penalty not to discover the secrets of his master's trade, but having quitted his place, the master *sued him and recovered the penalty*: this was held to discharge the second master from an action for hiring him, the penalty being deemed full satisfaction for the loss of service. *Bird v. Randall*, 3 Burr. 1345. 2 Bl. Rep. 387. S. C.

(Q) Actions, by others against the Master or Servant. 15 Vin. 327.

1. **T**ROVER lies against a servant who disposes of goods the property of another to his master's use, whether he has any authority or not from his master for so doing.

2. Where money is paid to the servant and he misapplies it, the party has his remedy against the master or servant at his election. *Cary v. Webster*, 1 Str. 480. *Attorney-General v. Perry*, 1 Com. Rep. 485. But it seems otherwise when the action against the servant is founded upon a tort. *Perkins v. Hughes*, 1 Wilf. 328. or wilful misconduct. *Savignac v. Rcome*, 6 Term Rep. 125.

3. Trover lies against the master for goods delivered to the apprentice. *Mead v. Hammond*, 1 Stra. 504.

4. The master is liable for the fraud of his apprentice. *Grammar v. Nixon*, 1 Stra. 653.

5. Action lies against a servant upon a bill drawn on him and accepted generally, though the order is to place it to the account of the master. *Thomas v. Bishop*, 2 Stra. 955.

6. No action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service.



## Master and Servant.

service of his principal, but the principal or those actually employed only are liable.

7. Where a servant executes a lawful command of his master in an unlawful manner, he is answerable for the misdemeanour, and not the master. *Naisb v. East India Company*, 1 Com. Rep. 469.

8. A master is not liable for medicines for his servant, unless on his express undertaking. *Newby v. Wiltshire*, 2 Esp. Rep. 739.

9. The proprietors of a mail coach are answerable for any injury happening to a passenger through the negligence of their driver. *White v. Boulton*, Peake's N. P. 81.

[G]

## Mayhem.

25 Vin. 144.

## (A) What shall be said a Mayhem.

1. **W**HERE a gentleman had apprehended a pickpocket, an accomplice followed and gave the gentleman a wound across the nose with a knife, this was held to be a flitting of the nose, and a maiming within the statute. *Carroll's case*, *Leach's C. Cases*, 83.

22 & 23  
Car. 2. c. 1.

2. It has been determined that if a man deliberately watches an opportunity and carries his intention into execution he may be said to lie in wait; but where a person went up to a man stealing turnips, who immediately cut him in the face, this was thought not to be a *lying in wait* with intent to maim. *Tickner's case*, *Ibid.* 222. What acts shall be so considered. *Vide Mill's case*, *Ib.* 294.

3. A husband cutting his wife's throat while in bed, and making thereby a wound three inches in length across her neck, is not a *maiming* or *lying in wait* within this statute. *Lee's case*, *Ib.* 61.

25 Vin. 145.

## (E) Punished. How.

1. **A** Person who maims himself that he may have the more colour to beg, may be indicted and fined. And, by the like reason, a person who disables himself that he may not be impressed as a soldier. 3 *Burn's Just.* 125.

2. If the mayhem comes not within any of the descriptions in the act, yet it is indictable at the common law, and punishable by fine and imprisonment: or he may bring an action of trespass, which kind of action hath now generally succeeded in the place of *appeals* in smaller offences not capital. 2 *Hawk.* 157. 160.

## Merchants.

[ A ]

### (A) What Regard the Law pays to them, and their Wages.

1. **T**HE custom of merchants is controlled by adjudged cases, therefore a custom contradictory to such cases cannot be received in evidence. *Edie v. The East India Company*, 1 Bl. Rep. 298. S. C. 2 Burr. 1216.

2. But where the custom had not been before judicially determined, evidence of the general opinion and understanding of persons concerned in such business was admitted. *Camden v. Cowley*, 1 Bl. Rep. 417. S. P. *Ravulinfon v. Stone*, 3 Wils. 4.

3. The law of merchants and the law of the land is the same; a witness cannot be admitted to prove the law of merchants. We must consider it as a point of law. *Per Lord Mansfield*, 3 Burr. 1669.

See *Trade, Bills of Exchange, Insurance, &c.*

## Merger.

### (H) Of what Estates. Trust Term in Equity.

15 Vin. 369.

1. **O**NE devised his real estate to his son and his heirs, chargeable with 300*l.* to be paid to his daughter on a contingency, which happened; afterwards the son died, and on his death the estate descended to the daughter in fee; and then the daughter died (but whether under age or not did not appear,) without having shewn any indication of her intention that the charge should not be merged; but the court thought that the charge was merged. *Ambl.* 246. 1754. *Chester v. Willes*.

2. Where tenant for life pays off an incumbrance upon the estate, he shall be considered as a creditor for the money so paid, but where tenant in tail pays it off, it is in exoneration of the estate of which he may make himself absolute owner. 1 Bro. Ch. Rep. 206. 1783. *Jones v. Morgan*.

3. A representative must take his interest as he finds it, and has no equity to vary it, therefore where a lunatick dies entitled

## Merger.

to an estate, and also to a charge upon it, the heir takes it discharged; a trust term to secure the charge makes no difference; for it remains inert, unless required to be executed for proper purposes; the trustees have no discretion. And *per* Lord *Loughborough*, Chancellor, at law and in equity where there is a confusion of rights there is an immediate merger: that is prevented in equity by the intention, either express or implied, as in the case of an infant entitled to an estate and also to a charge upon it, the rights remain distinct, because more beneficial. 2 *Ves. jun.* 261. 1793. *Lord Compton v. Oxendon*, 4 Bro. 397. S. C.

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*Mesne profits.*


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15 Vin. 393.

## (B) From what Time.

1. "ON the marriage of Sir *James Ash* a settlement was made " of two shares in the *New River*, and the same were " limited to Sir *James* for life, remainder to his wife for life, " and after their decease one share was limited to such of the " younger children of Sir *James Ash* as were not his heirs at law, " or for want of such issue, to the sisters of Sir *James* and their " children, as Sir *James* should limit and appoint; but in case of " no issue of Sir *James Ash*, or if he should make no appoint- " ment, the same was limited to the sisters, and the children of " *Catharine*, one of the sisters (under whom the plaintiff claims,) " in such manner as they were entitled to one whole share on " the death of Sir *James*." The settlement being in the custody of the defendants, they claimed a right to such share, in right of the wife, as the heir of her father, as if no settlement had been made. They also levied a fine of the two shares in the three counties through which the water ran, and received the profits from the death of Sir *James Ash* in 1733 till the filing of the bill in 1741, when the plaintiffs discovering the settlement, brought this bill for discovery and to be relieved. The fines were levied in *Hil.* term 1733, but no claim was set up or entry proved, only that a demand of the profits was made in the office in the name of the defendants on the 14th of *Feb.*, and the first payment was made of the *Christmas* dividend before due on the 23d of *Feb.*, which was after the fine levied, and no other *seisin* appeared. Sir *James Ash* died in *November*, the first half year became due at *Christmas*, but not received till after the fine was levied. The court were of opinion that the plaintiffs were proper in coming into equity for a discovery of the deed under which the title arises, to have it produced at trials at law, and to have attested copies,

copies, and also to have an account of rents and profits. 3 Atk. 336. 1745. *Lord Townsend v. Ash.*

*In this case the court said, that though it was matter of law, yet the court would determine upon it notwithstanding, for that it was not necessary that every legal question should be sent to law. Ibid. See vide Norton v. Fletcher, 1 Atk. 525. where the court said that the rule in equity was the same as at law, that trespass would not lie for mesne profits till possession was recovered, and that a bill could not be brought for an account thereof till then.*

2. Account of profits of coal mines not decreed without shewing possession; the bill was retained with liberty to bring an ejectment. 1 Ves. 232. 1749. *Sayer v. Pierce.*

3. Bill filed by a widow against the heir of her husband for dower: the bill was ordered to be retained for a year, to try her right, and writ of dower brought; before issue joined the heir died: then the widow's right was established at law against his devisee: the widow dying, her representatives filed a bill of revivor and supplement against the executor and devisee of the heir for the third part of the mesne profits, to the death of the widow; which was decreed, and the decree affirmed on a rehearing. 2 Bro. Ch. Rep. 620. 1789. *Curtis v. Curtis.*

4. Though dowress die before her right be established equity will decree an account of rents and profits of the estate of which she is dowable in favour of her representative. 1 Fonb. Treat. in Eq. 158. *Wakefield v. Child.* 1791.

5. In a doubtful case the account of rents and profits was confined to the time of filing the bill. 4 Bro. Ch. Rep. 521. 1794. *Forder v. Wade.*

6. Account of rents and profits confined to six years before the filing of the bill, by analogy to the action for mesne profits. 3 Ves. jun. 744. 1801. *Meade v. Meade.*

7. Lord Hardwicke held in the case of *Dormer v. Fortescue*, it was clear both in law and equity, and from natural justice, that the plaintiff, from the death of his father, the time when his title accrued, is entitled to the rents and profits. 3 Atk. 124.

8. Where there is a trust and mere equitable title, the plaintiff shall have an account of the rents and profits from the time the title accrued, unless there are special circumstances to restrain it to the bringing of the bill. *Ibid.* The court will restrain it to the filing the bill where there has been any default in the plaintiff in not asserting his title sooner. *Ibid.*

(C) Action for them. Who shall have Action, and <sup>15 Vin. 394.</sup> at what Time: after the Estate determined.

1. ACTION for the mesne profits is usually brought by the lessor of the plaintiff in his own name; and in that case, on proving a good title in himself, and an actual ouster and perception of the profits by the defendant antecedent to the demise and ouster in ejectment, he will recover damages for those profits. They are seldom however an object of litigation, as the demise

## Mesne Profits.

and ouster in ejectment are generally laid soon after the time when the lessor's title accrued. *Runnington on Ejectments*, p. 428.

2. Action for mesne profits (including the costs of the ejectment,) brought in the name of the lessee against the tenant in possession, *after judgment by default*, held to be maintainable. *Aislin v. Parkin*, 2 Bur. 665.

3. The jury are not in all cases bound by the amount of the rent, but may give *extra* damages. 3 *Wils.* 121.

4. The rule in equity is the same as at law, as trespass will not lie for mesne profits till possession is recovered, so neither can a bill be brought for an account thereof till then. 1 *Atk.* 525.

5. It was observed *per Cur.* in the case of *Treherne v. Gressingham*, that an action for mesne profits tends to create double expence. Why should not the plaintiff be ready at the trial of the ejectment to prove his damages, which may be recovered in that action, without bringing a second for mesne profits? The true rule, as to the time from which mesne profits are to be recovered, seems to be where judgment is against the casual ejector, from the time of the delivery of the declaration to the tenants in possession, or from the time of an actual demand of possession proved, where judgment is against the tenants in possession (or the landlord defending in their stead,) from the ouster admitted by the common consent rule; but in neither case from the demise, which may be laid back at the plaintiff's pleasure. *Barnes*, 87.

6. In the case of *Stanynought v. Cousins* it was held, that the plaintiff will be entitled to recover the mesne profits only from the time he can prove himself to have been in actual possession: and therefore if a man makes his will and dies, the devisee will not be entitled to the profits till he has made an actual entry. 2 *Barnes*, 367.

7. If, however, a subsequent entry has a relation back to the time the plaintiff's title accrued, yet the defendant may plead the statute of limitation, and so protect himself from all but the last six years. *Buller's Ni. Pri.* 88.

15 Vin. 397. (K) Pleadings; and what Evidence must be given in Actions for them.

1. IT is now settled upon principles, that after a recovery in ejectment, the tenant is estopped from controverting the plaintiff's title in a subsequent action for the *mesne profits*, provided the plaintiff only proceeds for the *mesne profits* from the time of the ouster complained of in ejectment: but if he proceed for *antecedent profits* he must prove his title to the premises from whence they arose, to shew his right to receive them. *Runnington on Ejectments*, p. 440.

2. Lord Mansfield, in delivering the opinion of the court in the case of *Aislin v. Parkin*, said, "An action for the *mesne profits* is consequential to the recovery in ejectment. It may be brought  
" by

“ by the lessor of the plaintiff in his own name, or in the name  
 “ of the nominal lessee, and in either shape it is equally his ac-  
 “ tion. The tenant is concluded by the judgment, and cannot  
 “ controvert the title. Consequently he cannot controvert the  
 “ plaintiff’s possession, because his possession is a part of his title:  
 “ for the plaintiff, to entitle himself to recover in ejectment,  
 “ must shew a possessory right not barred by the statute of limi-  
 “ tations. This judgment, like all others, only concludes the  
 “ parties as to the subject-matter of it; therefore beyond the  
 “ time laid in the demise it proves nothing at all; because beyond  
 “ that time the plaintiff has alleged no title, nor could be put to  
 “ prove any. As to the length of time the tenant has occupied  
 “ the judgment proves nothing; nor as to the value; therefore  
 “ it must be proved how long the defendant enjoyed the premises,  
 “ and what the value was.” This unanimous resolution of all  
 the judges, upon short plain principles, will not only be a certain  
 and uniform rule upon actions for *mesne profits*, but may tend to  
 put the fictitious remedy by ejectment upon a true and liberal  
 foundation, to attain speedily and effectually the ends of justice  
 according to the real merits of the case. 2 Burr. 667.

3. Hence it should seem that in order to prove the plain-  
 tiff’s title in an action for the *mesne profits* it is only necessary  
 to produce the judgment in ejectment; and so is the practice  
 where the judgment is *after verdict*; but where the judgment is  
*by default* the practice is different; then it is usual not only to  
 produce the judgment, but also to prove a writ of possession  
 executed. This latter proof does not seem to be necessary; for  
 if the tenant be concluded by the judgment in ejectment from  
 controverting the plaintiff’s title, he is consequently concluded  
 from controverting his possession, which is part of his title. Bull.  
 Ni. Pri. 87. Runn. on Eject. 442.

4. As to the value of the *mesne profits* the judgment in eject-  
 ment does not prove any thing; the value therefore must necessarily  
 be proved; but in estimating it the jury are not confined to the  
 mere rent of the premises, but may give whatever damages they  
 think proper. Goodtitle v. Tombs, 3 Wils. 118.

5. Bankruptcy is no plea in bar in an action of trespass for the  
*mesne profits*. Goodtitle v. North, 2 Dougl. 584.

6. Where after a recovery in ejectment, and before an action  
 for the *mesne profits*, the defendant became a bankrupt, and the  
 jury did not include the costs of the ejectment in the verdict in  
 executing a writ of inquiry on the action for *mesne profits*, the  
 court refused to set aside the inquisition, because the plaintiff  
 might have proved the costs as a debt, under the defendant’s  
 commission of bankrupt. Gulliver v. Drinkwater, 2 Term Rep. 261.

## Mill.

15 Vin. 398. (A) *Customs to grind at Mills. Extend to whom, and what.*

A Custom, "That all the inhabitants of a manor shall grind all their corn, grain, and malt, which by them or any of them shall be used or spent, ground within the manor at a certain mill," is good. *Cort v. Birkbeck, Dougl. 208.*

[ G ]

## Miscasting.

15 Vin. 403. (A) *Miscasting by the Plaintiff. When it shall prevent Judgment.*

1. IF the jury (by allowing interest on a judgment) give greater damages than laid; on error brought, the plaintiff shall not have liberty, in another term, to remit the surplus, to enter judgment for the damages laid only. *Wray v. Lister, 2 Stra. 1110.*

2. Where a verdict is given for a greater sum than the amount of the damages laid in the declaration, and for that cause a writ of error is brought, the court will permit the plaintiff to enter a *remittitur* of the excess above the sum laid, on payment of the costs of the writ of error. *Pickwood v. Wright, 1 H. Bl. 643.*

[ G ]

## Misnomer.

15 Vin. 406.

(C. 3) *Pleadings. By whom.*

1. IF the defendant omit to plead a *misnomer*, he may be taken in execution by the wrong name. *Crawford v. Satchwell, 2 Stra. 1218,*

2. If

2. If defendant, served by a wrong name, appears by his true name, and plaintiff declares against him by that name, the court will not on motion stay proceedings for irregularity, but leave defendant to plead variance. *Hole v. Finch*. *Jackson v. Doleman*, 2 *Wils.* 393. *Secus*, if plaintiff file common bail for him according to the statute by his right name. *Doo v. Butcher*, 3 *Term Rep.* 611.

3. If the *latitot* be sued out against the defendant by one Christian name, and the *alias* by another, and the plaintiff afterwards proceed, the court will set aside the proceedings for irregularity. *Corbett v. Bates*, 3 *Term Rep.* 660.

4. Defendant pleaded a *misnomer* in abatement which was after an *imparlance* thus: "At which day came *Ham John Crapper* (the defendant's true name) who is sued by the name of *John Capper, &c.*" to which the plaintiff demurred; and objected that this plea being in *abatement* ought to have been pleaded of the same term with the declaration, or after a *special imparlance*, and that this is after a *general imparlance*. But *per curiam*—this *imparlance* by the true name is *special* for this purpose; but if he had said *venit predict.* *John Capper* it had been bad, for that would have confessed that *John Capper* was the true name. *Brewster v. Capper*, 1 *Wils.* 261.

5. Where defendant had been sued as the Right Honourable *Hamilton Fleming*, Earl of *Wigtoun*, having privilege of peerage, and had judgment against him, and in debt on that judgment he was called *Hamilton Fleming Esquire*, commonly called Earl of *Wigtoun*; on *nul tiel record* pleaded, held to be a failure of record. *Blackmore v. Fleming*, 7 *Term Rep.* 447.

6. A *misnomer* may be pleaded in abatement, where the plaintiff misnames himself. 1 *Bos. & Pull.* 44.

7. If defendant pleads *misnomer*, but his plea and affidavit are entitled by the wrong name, his plea shall be set aside. *Barnes*, 348.

8. If the plea begins "*A. the said A. B. who is sued by the name of C. D.*" it is bad, but the court gave leave to amend on payment of costs. *Jackson v. Ford*, 3 *Wils.* 413.

9. Any variation in the name of a corporation is fatal. *Turvil v. Ainsworth*, 2 *Stra.* 787.

10. A variance in the name of the person from whose dwelling-house goods are stolen to 40s. value, as "*Sarah Luns*" instead of "*Sarah London*" is fatal to the *capital part* of the charge. *Woodward's case*, *Leach's Ch. Ca.* 287, notes.

(C. 6) Abatement of *Writ* by what *Misnomer*. 25 Vin. 413.  
Names of Baptism.

1. **W**HERE a defendant is baptised by the name of *Richard James*, and is declared against as *James Richard*, he may plead the *misnomer* in abatement. *Jones v. Macquillin*, 5 *Term Rep.* 195.



2. A declaration against *John A.* otherwise *John James A.* is bad, for a man cannot have two Christian names. *Evans v. King*, *Willes Rep.* 554.

3. If defendant is sued by a wrong Christian and surname, he may plead it in one plea, and it is not double. *Read v. Motteux*, *T. 9 G. 2. B. R. H.* 286. *1 Com. Dig.* tit. *Abatement*.

4. Defendant need not aver that he was baptised by his Christian name, only that it is his name, and by that name he was always called, &c. *Ibid.*

5. If bond be given to *Elizabeth*, and action brought in the name of *Elizabeth*, defendant shall not plead that the plaintiff's name is *Isabel*. *Monkhouse v. Hutchinson*, *Bunb.* 101.

6. The plaintiff brought trespass and false imprisonment by the Christian name of *Archibald*. The defendant justified under a *capias ad satis*, upon a judgment against *Arthur*: and averred that the plaintiff in this action was the same person who was sued by the name of *Arthur*. And on demurrer, the court held it a good plea, the defendant having missed his time for taking advantage of the *misnomer*, which should have been by pleading it in the first action. In the case of a bond given in a wrong name, he must be sued by that wrong name, and the execution must pursue it. The defendant had judgment. *Crawford v. Satchwell*, *2 Stra.* 1218.

7. Earl of *Litchfield* is a sufficient description, though the Christian name be mistaken, for there can be but one Earl of *Litchfield*. *Ingoldby v. Martin*, *1 Stra.* 316.

8. Where an indictment for larceny laid the goods stolen to be the property of "*Victoire Baronesa Turkheim*," and it appeared that she always went by that name, though her real name was *Selina Victoire*, and *Baronesa Turkheim* her title only, it was held good. *E. Sull's case*, *2 Leach's Ch. Ca.* 1005.

9. Where the name of the plaintiff is mistaken in the process, and in all the proceedings, the court will give leave to amend while all is on paper. *Gardner v. Walker*, *3 Asst. Reporter's Reports*, 935.

15 Vin. 414. (C. 7) Pleadings. Known by the one Name and the other.

TO a plea of *misnomer* to an indictment, which may be pleaded *ore tenus*, the clerk of the arraigns may reply, that the prisoner is known, as well by the one name as the other. *Dean's case*, *1 Cr. Cases*, 535.

15 Vin. 416. (C. 9) Pleadings. Of the Place where.

1. THE plaintiffs were incorporated by the name of "The mayor and burgesses of the borough of *Stafford*, in the county of *Stafford*," and sued by the name of "the Mayor and Burgesses

*Burgesses of the borough of Stafford.*" This misnomer is pleadable in abatement, and cannot be taken advantage of in any other way. *Stafford v. Bolton*, 1 Bos. & Pull. Rep. 40.

2. In the margin of the declaration stood the word *Middlesex*, and defendant's addition was *late of Westminster*, without saying in the county aforesaid. Defendant pleaded in abatement, that it did not appear by the declaration at what place he was commorant. Plaintiff moved to set aside the plea. The court said it might be demurred to, but they would not set it aside on motion. *Barnes*, 338.

3. Plaintiff may name the defendant of the place where he lately dwelt. *Cortissof v. Munoz*, 2 Stra. 923.

## Money.

[G]

### (A) In what Cases it may be followed.

15 Vin. 420.

1. **MONEY** covenanted to be laid out in land shall descend as land; but he that would be entitled to the fee of the land when purchased may dispose of it by will, though not attested by three witnesses; also a parol direction for the payment of it seems to be good. So if money is ordered or devised to be laid out in land and settled to the use of A. in tail, remainder to himself in fee, equity will order the money to A. *secus* if the remainder thereof be limited to a third person; also though by a voluntary contract money is agreed to be laid out in land, the court will execute such agreement in favour of the heir. *Edwards v. Countess of Warwick*, 2 P. Wms. 171.

2. One articles to buy land, and dies; his executors shall pay the money, but the heir shall have the lands. 2 P. Wms. 632.

### (C) Pleadings and Judgment.

15 Vin. 427.

1. **DOLLARS**, or *Portugal* money, not current by proclamation, are not goods within the meaning of the 24 Geo. 2. c. 45. *Leigh's case*, 1 Leach's Cr. Ca. 62.

2. Money is not within the meaning of the statutes 3 W. & M. c. 9. and 5 Ann. c. 31. against the buyers or receivers of stolen goods or chattels. *Guy's case*. *Ibid.* 276.

3. Where the plaintiff declared in *indebitatus assumpsit* for money lent by him to one *James Dalrymple*, at the special instance and request of the defendant, the judgment was arrested, for the word *lent* is a technical term, and imports a loan to *J. Dalrymple*; if so,   
 do

he was the debtor, and therefore *the defendant could not also be indebted*; for there cannot be a double debt on a single loan. But it had been otherwise, had the party declared for money *delivered* to such a person at the request of the defendant, for then the loan had been to the defendant himself. *Marriot v. Lyfter*, 2 *Wils.* 141.

A. But where the plaintiff declared for money *lent to the defendant's wife* at his request, and it was attempted to arrest the judgment on the authority of the above case, the court held that a loan to the wife; at the husband's request, was a loan to the husband himself, for the husband and wife are but one person. *Stephenson v. Hardy*, 3 *Wils.* 388.

5. A bond conditioned for payment of money on 25th *December*; a subsequent deed between the same parties, by which the obligee covenanted, that if the obligor should pay on the 25th *December* 5*s.* in the pound, &c., such payment should be accepted in full discharge and satisfaction of all sums due, &c. and might be pleaded and given in evidence, &c. the obligor (to an action on the bond) pleaded a tender and refusal of the 5*s.* in the pound on the 25th of *December*, and holden good. *Trevett v. Angus, Willis Rep.* 107.

6. On debt on recognizance of bail, if the record is conditional, and the declaration not, the plaintiff cannot have judgment. *Barnes*, 60.

7. On a certificate of the commissioners of army debts for 105*l.* 18*s.* 7*d.*; the demand (which it was necessary by the statute to make) had been made for 105*l.* 18*s.* 6*d.*, and plaintiff was nonsuited. *Bunb.* 166.

## Mortgage.

15 *Vin.* 436.

### (A) What it is.

1. **MONEY** due upon a mortgage is a debt of the mortgagor, to the payment whereof his personal estate is primarily liable (the land being considered only as a pledge) as between his heir or devisee, and executor, unless some express, or necessarily implied declaration of his, exempts his personal estate, and throws the charge on his real. 5 *Bro. Par. Ca.* 299. 1772. *Earl of Belvidere, Appellant, and Wm. Rochfort, Respondent.*

2. *Per Lord Hardwicke, Chancellor.* It is determined on the statute of frauds, that if a mortgage is intended by an absolute conveyance in one deed, and a defeazance making it redeemable in another: the first is executed, and the party goes away with the defeazance; this is not within the statute of frauds. 2 *Ves.* 225. 1750. *Dixon v. Parker.*

### 3. A mortgage

3. A mortgage may be made of a ship at sea, and if the mortgagee takes all methods in his power to get the possession, such as a bill of sale, &c. it will be out of the stat. *James* 1st, as was held in *Brown v. Heathcote*, which was taken notice of by the judges in *Ryal v. Rowles*, otherwise no security could be made of a ship at sea. But the suffering the ship to come back, and go on another voyage, makes it a very different case. *Per Lord Hardwicke.* 2 *Ves.* 272. 1751. *Ex parte Matthews.* See *Brown v. Heathcote*, 1 *Atk.* 160. 1746. Anstr. 109.

4. A deposit of a deed entitles the holder to have a mortgage. 1 *Bro. Ch. Rep.* 270. 1783. *Ruffel v. Ruffel.*

(B) What is a Mortgage and what a Purchase.

35 Vin. 437.

1. **WHERE** by the express terms of a mortgage it is agreed, that if the money be not paid within a certain time the estate shall not be redeemable; this is considered in the nature of an original purchase, and no redemption ought to be allowed, especially after a lapse of many years. 4 *Bro. Par. Cos.* 142. *March* 1733. *Tasburgh App.* and *Sir Robert Ecclin and others Resp.*

2. *A.* conveys land to *B.* and his heirs by lease and release, and by a defeazance bearing date with the release agrees that if he pays 1000*l.* borrowed of *B.* within a year, that *B.* should reconvey to him; but if he failed to pay the money within the year, then *B.* should mortgage or absolutely sell the same lands free from redemption. The money not being paid at the time, *B.* agreed to convey the estate to *C.*, and in the agreement and conveyances an exception was made, and the defeazance was mentioned; and a question arising, whether *C.* had an absolute estate, the court determined that he had purchased an estate subject to a redemption by *A.* *Comyn's Rep.* 603. 11 *G.* 2. *Croft v. Powell.*

3. Two contract to buy an estate in mortgage, and covenant to indemnify each other against his share of the mortgage debt; it does not make the debt his own so as to be payable out of his personal estate in the first place. *Ambl.* 171. 1753. *Forrester v. Lord Leigh.*

4. The plaintiff's grandfather in 1689 mortgaged the estate in question to the *Whiteheads*; they afterwards mortgaged it to *Cartwright* and *Heywood*, and their heirs for 200*l.*, who, to secure the interest, leased the estate to the plaintiff's father in *June* 1689, and to his assigns for 5000 years, at 12*l.* a-year rent for the three first years, and 10*l.* a-year for the remainder of the term, and if at three years end the 200*l.* was paid, and interest, then the premises were to be re-conveyed; receipts were given sometimes for interest, and sometimes for a rent charge; the last in 1730. The 200*l.* lent was charity money, directed to be laid out in the purchase of lands in fee, the rents to be applied for the clothing 24 needy housekeepers: in 1738 the plaintiff gave notice he would pay

pay in the money, but the defendant refused to take it, and insisted it was an absolute purchase, and so it was decreed by the *Master of the Rolls*; and the decree was affirmed. 2 *Atk.* 494. 1742. *Mellor v. Lees.*

25 Vin. 440.

(C) Disputes between the Mortgagor and Mortgagee.

1. **W**HERE a mortgagor brings a bill to redeem, and after a decree the account is taken by the Master, but before any thing further is done the plaintiff dies; his infant son and heir is bound by the account. 4 *Bro. Par. Ca.* 447. 1742. *Badham v. Odell.*

2. A mortgagee shall not be allowed to present to a living which becomes vacant, because nothing can be taken for it, but shall be looked upon as a trustee for the mortgagor or his grantee, and shall present such person as they shall name. *Comyn's Rep.* 343. 7 *G. I.* *Galley v. Selby.* See *Bunb.* 130. S. P.

3. Where it appeared that the Solicitor of the mortgagee had a settlement belonging to the mortgagor in his possession, and was a trustee for both, the court would not order him to deliver it up to mortgagor. *Bunb.* 298. 1731. *Siddon v. Charnells and others.*

4. A mortgage of a brewhouse with the *appurtenances*, will not convey the utensils, but the things only belonging to the out-houses. 1 *Atk.* 477. 1750. *Ex parte Quincey.*

5. Equity only removes fraudulent conveyances out of the way, but will not decree profits back against the original debtor and owner of the estate received *pendente lite* in favour of judgment creditors from filing of the bill. 2 *Atk.* 107. 1740. *Higgins v. The York Buildings Company.*

6. A mortgagor in possession is not liable for the rents and profits to the mortgagee, for he ought to take the legal remedy to get into possession. *Ibid.* See also 3 *Atk.* 244. 1745. *Mead v. Lord Orrery.*

7. A mortgagee may refuse to part with the deeds till the money is paid, but ought not to deny an inspection of them in his hands. 2 *Atk.* 330. 1742. *Thornhill v. Evans.*

8. A mortgagee is not precluded from bringing an ejectment at law at the same time he has a bill of foreclosure depending in equity. 2 *Atk.* 343. 1742. *Booth v. Booth.*

9. A mortgagee in possession is not obliged to lay out money any farther than to keep the estate in necessary repair. 3 *Atk.* 518. 1747. *Godfrey v. Watson.*

10. After foreclosure and sale, the amount being insufficient, the mortgagee may bring an action on his bond for the residue of his debt. 2 *Bro. Ch. Ca.* 125. *Mich.* 1786. *Tooke v. Huntley.*

11. On a bill of foreclosure it was referred to the deputy remembrancer to take an account of what the mortgagee had received for the rents, &c., or might have received, without wilful neglect. It appeared that the premises (malhouses, &c.) had been

been allowed to fall so much out of repair, that the rent fell from 22*l.* to 18*l.* Plaintiff had done some repairs and had held 40 years. The court were of opinion, that as the *only* proof of the repairs being insufficient is the diminution in value, we must confirm the report; for it cannot be supposed that after 40 years possession, the mortgagee is bound to leave the premises in as good condition as he found them. 1 *Anstr.* 96. 33 G. 3. *Ruffel v. Smithies.*

12. The plaintiff, a mortgagee, had got possession of the mortgaged estate by ejectment, sued at law upon the covenant for non-payment, and brought this bill to foreclose, which the court held regular, and refused to stop the proceedings at law, unless the defendant would bring the money into court. 2 *Anstr.* 497. 35 G. 3. *Rees v. Parkinson.*

13. On a bill to redeem, the mortgagee cannot object that the bill does not state a valid legal conveyance to him. 3 *Anstr.* 715. *East.* 36 Geo. 3. *Roberts v. Clayton.*

## (D) Disputes between Mortgagor, Mortgagee, and 15 Vin. 442.

1. A Leasehold estate is affected by an *elegit* or *feri facias* from the time it is lodged in the sheriff's hands, and if the debtor, subsequent to this, makes an assignment of it, the judgment creditor may proceed at law to sell the term, and the vendee will be entitled to the possession notwithstanding such assignment. 3 *Atk.* 739. 1757. *Burdon v. Kennedy.*

2. Mortgage of a ship in the port of *Dublin*, and delivery of muniments. The mortgagee insured her there, and made a second mortgage: the second mortgagee took possession as soon as he was informed that she was in an *English* port. This is sufficient to take it out of the stat. 21 *Jac.* 1. c. 19. 3 *Bro. Ch. Rep.* 362. *Ex parte Batson.*

## (E. 2) Disputes between Mortgagor and Assignee of 15 Vin. 441.

1. ASSIGNMENT of a mortgage without the privity of the mortgagor, the assignee takes subject to the account between the mortgagor and mortgagee. 4 *Ves. jun.* 118. 1798. *Mathews v. Wallwyn.*

2. As between mortgagee and persons claiming under him without the privity of the mortgagor, they cannot add to what is due, settle the account, or turn interest into principal. *Ibid.* 128.

3. By indenture dated the 10th of *April* 1792, *Benjamin Sorrell* mortgaged certain leasehold premises in the county of *Middlesex* for the remainder of his term of 60 years, to secure the sum of 300*l.* with interest to *Thomas Clifton*, subject to redemption upon payment

payment of the principal and interest upon the 29th day of *Sept.* following; and the said indenture contained a covenant by the mortgagor for payment of the mortgage money and interest, and he gave a bond of the same date for the same. *Benjamin Clifton*, by indenture of the 16th *Jan.* 1794, in consideration of 600*l.* advanced him by *Ann Williams*, assigned the mortgage to her, her executors, administrators, and assigns, subject to redemption on payment of 600*l.* and interest on or before the 16th *Jan.* 1795: and as a farther security *Clifton* mortgaged other premises, and gave a bond of the same date in the penalty of 1200*l.* The assignment of the mortgage was duly registered. *Sorrell*, upon the 13th of *Jan.* 1796 paid to *Clifton* 100*l.* on account of the principal, and 1*l.* 10*s.* for interest due on the mortgage: the receipt for which sums expressed the former to be "in part of 300*l.* secured by mortgage," and the latter to be "for interest due at *Lady-day* next." Upon the 22d of *May* 1796, *Sorrell* paid to *Clifton* the farther sum of 100*l.* on account of the said principal money, the receipt for which expressed that payment to be "in part of 200*l.* due upon the mortgage." Upon the 18th of *May* 1797, *Clifton* became bankrupt; in *July* the assignee of the mortgage filed a bill for the foreclosure, charging, that the registry of the assignment was notice to the mortgagor. Upon the 14th *Sept.* 1797, the money remaining due by the defendant for principal and interest, the payments made to *Clifton* being deducted, and the costs up to that time were tendered on the part of the defendant to the plaintiff, and refused. The mortgagor by his answer denied any notice of the assignment until the 22d of *April* 1797, when he was applied to by the solicitor for the plaintiff for the whole 300*l.* and interest; he denied collusion, and prayed his costs from the time of the tender. And the court decreed, that the mortgagor, the defendant, should be at liberty to redeem upon payment of what remained due, deducting the payments to *Clifton*, with costs to the time of the tender only. 4 *Ves. jun.* 389. 1799. *Williams v. Sorrell.*

15 Vin. 444. (F) Disputes between Mortgagee and Mortgagee.

1. A Third mortgagee having lent his money without knowing that there was a second mortgage upon the same estate, may pay off the first incumbrancer, and taking an assignment of his interest to himself, hold the estate against the second mortgagee, till he shall be paid what is due to him upon both mortgages. 6 *Bro. Par. Ca.* 28. 1764. *Belchier v. Meusforth.*
2. *Spencer* made a mortgage of the lands to the plaintiff, and the plaintiff having a great confidence in the said *Spencer*, and the mortgage being executed in *London*, and *Spencer* pretending his title deeds were in the country, the plaintiff lent his money to *Spencer*, taking *Spencer's* word, that he would deliver to him the title deeds. *Spencer* borrowed 2000*l.* of *Dr. Egerton* the defendant,

ant, on a mortgage of the same lands; at the same time producing and delivering to the defendant *Egerton* all his title deeds, which were perused by the defendant *Egerton*'s counsel, and thereupon the title approved. Bill by plaintiff the first mortgagee to foreclose, and to compel the defendant to discover the title deeds relating thereto, and to deliver up the said title deeds to the plaintiff; but the court was of opinion, that the first mortgagee having permitted the mortgagor to keep the title deeds, he was accessory to drawing in the second, and therefore would not compel the defendant to deliver up the title deeds, unless the first mortgagee would pay him his mortgage money. 3 *Wms.* 280. 1734. *Head v. Egerton.*

*See Ryale v. Rowles, 1 Ves. 360. See also Stanhope v. Earl Verney, Co. Lit. 293. b. note, on a declaration of a trust of a term, where Lord Northington decreed in favour of the second incumbrancer, who had possession of the deeds, against a former assignee without delivery of the deeds. See also Goodtitle v. Morgan, 1 Term Rep. 755.*

3. A decree had been obtained in 1748 in a cause, wherein the now plaintiff and the defendants among other creditors were plaintiffs for the sale of the estate of one *Manaton*. The Master was directed to inquire into the priority of the demands. The plaintiff bought in an incumbrance in 1694, and made a claim before the Master to have it tacked to his mortgage, and thereby to be paid before the defendants; the Master refused to make a report as to that; whereupon the plaintiff filed this bill. A demurrer was put in to so much and to such parts of the bill as sought to have a satisfaction for the money claimed by the plaintiff to be due under the securities in the bill set forth in preference to the defendant's mortgages. And the court was of opinion, that although a *puiſne* incumbrancer may *pendente lite* take in the first and gain a preference to a second by tacking the first to the third; yet he cannot do so after a decree and directions to settle the priorities; and allowed the demurrer. 2 *Ves.* 571. Aug. 1754. *Wortley v. Birkhead, 3 Atk.* 809. S. C.

4. Upon settling the priority of creditors after the Master's report, defendant the mortgagee insisted that he could not be redeemed without being paid his judgment debts, and also a bond-debt in preference to the plaintiff's claiming under a deed of trust by the mortgagor in his lifetime conveying the equity of redemption; and that although a bond cannot be tacked against the mortgagor himself coming to redeem, it may be against the heir of the mortgagor; and the plaintiffs coming after the mortgagor's death, come in place of the heir. The court was of opinion, that as to the judgment debts the defendant ought to have the benefit of them, they being prior to the trust deed, and as to what was reported due thereon, that he was intitled to a priority to the creditors under the deed of trust; but that the bond could not be tacked, as the bond is a charge upon assets, and the court never does it against creditors. 2 *Ves.* 663. 1755. *Anon.* See also 1 *Ves. jun.* 513. 1792. *Hamerton v. Rogers, S. P.*

5. Where



5. Where a subsequent purchaser or mortgagee who *pro tanto* is a purchaser, has notice of a former purchase or incumbrance, he cannot avail himself of an old outstanding term prior to both, in order to get a preference; but if he has no notice of such prior purchase or incumbrance, and having the best right to call for the legal estate, gets an assignment of it, equity will not deprive him of the benefit of it; for a purchaser *bonâ fide*, for a valuable consideration, and without notice, cannot be hurt in equity, nor have the benefit of the law taken from him; notice makes him come fraudulently. Also where a second mortgagee of an estate, on which there is an old outstanding term, has notice of an incumbrance prior to his own, as he has not the legal estate in him, nor the best right to call for it, the whole title and consideration being in equity, the general rule must take place, *viz. qui prior est in tempore, potior est in jure*, and the prior incumbrancer may satisfy himself of any other incumbrances on the estate, though unknown to the puisne mortgagee when he advanced the money. 2 *Ves.* 685. 1756. *Willoughby v. Willoughby*.

6. *John Barnardiston* being entitled under a settlement in 1695 to a remainder in tail expectant on the death of Sir *Samuel Barnardiston*, and subject to a term of 99 years, for raising 12,000*l.* by indenture of 7th and 8th *August* 1732, granted a rent charge of 100*l.* a-year to plaintiff and his heirs. On the 9th of the same month he granted a rent-charge of 100*l.* a-year to *Gibbons*, and covenanted, that the estate was free from incumbrances, except the rent charge to plaintiff. *John Barnardiston* afterwards coming into possession of the estate, and having suffered a recovery to himself in fee, by indentures of lease and release 13th and 14th *March* 1735, in consideration of *Gibbons* having extinguished the rent charge of 9th *August* 1732, granted him a new rent charge of 100*l.*, which was afterwards assigned to *Northey* in 1748, and has been since assigned to *Jolliffe*. There was a second rent charge granted to the plaintiff, and two others to *Gibbons* by *John Barnardiston*, subsequent to that in 1735, which was assigned to *Northey* and Sir *William Jolliffe*, who got an assignment of the term of 99 years by way of mortgage. Plaintiff became owner of the inheritance, and, the estate proving deficient to pay all the charges upon it, filed his bill to redeem the estate on payment of what was due for principal and interest, on the term of 99 years. The defendants set up the term as a protection to their several rent charges. The question was, whether they are affected by notice of plaintiff's rent charge, and therefore to be postponed thereto, as to all or any of their rent charges. And the court was of opinion, that as to all the rent charges, except the rent charge of 1735, the defendants were to be preferred to the plaintiff; for as to them, the defendants are not affected with notice of the rent charge of 1732. *Ambl.* 311. 1756. *Mertins v. Jolliffe*.

7. Where

7. Where a purchaser cannot make out his title but through a deed, which leads to a fact, he will be affected with notice of that fact, and where one affected with notice, conveys to another without notice, the assignee, *having the legal estate*, shall not be affected with notice to the assignor, and *vice versa*. *Ibid*.

8. Mortgagee of a *reversion* not having the title deeds, shall not be postponed to another mortgagee (whose mortgage was made after the mortgagor came into possession,) who has the title deeds, there being neither fraud nor gross negligence. 2 *Bro. Ch. Rep.* 650. 1789. *Tourle v. Maude and others*. In *Penner v. Jemmat*, 28 June 1785, in notis, Lord Chancellor said, that there must be a voluntary leaving of the deeds, to entitle the second mortgagee to have the prior mortgage postponed.

By indenture tripartite 13 Feb. 1758, between Barrows Smith and John Applebee, of the first part; plaintiffs, the trustees, of the second part; and Edward Maude and all other the joint and separate creditors of said Smith and Applebee, who should sign and seal the premises, of the third part; reciting, among other things, that said Smith and Applebee were indebted jointly to divers persons on account of their trade, and to divers persons on their separate accounts, it was witnessed, that the said Smith and Applebee (by the direction of Maude, &c.) did grant, bargain, sell, and assign to plaintiffs, all their joint and separate goods, chattels, &c. (except as therein mentioned,) for the benefit of their creditors, and for such uses as therein mentioned; and also reciting inter alia, that the said John Applebee was entitled as of his own separate estate, to a reversion in fee or fee tail, expectant on the death of his mother, of divers messuages in the county of Kent. It was further witnessed, that the said John Applebee did, for himself, his heirs, executors, and administrators, covenant with the plaintiffs to convey and assure to them and their heirs, all his estate and interest therein, &c. upon trust to be sold, and the money arising thereby to be applied upon the same trusts and purposes as aforesaid. And the deed contained a general covenant from Smith and Applebee for further assurances. Maude afterwards sued out a commission of bankruptcy against John Applebee, 23d April 1760, and he and Pacatus Shard were chosen assignees, and an assignment and bargain and sale executed to them. The assignees, 21st Dec. 1760, filed their bill against the plaintiffs to set aside the trust deed. On the 13th of March 1761, an order was made that the parties should bring actions to try their rights, and the plaintiffs obtained a verdict in an action of trover against the assignees; and the assignees were nonsuited in an action which they brought against the plaintiffs. Mary Applebee, the mother of John, died on the 4th Feb. 1762. Plaintiffs, the trustees, filed their bill against the assignees to have the estate delivered to them: both causes came on together, 12th Nov. 1765, before Lord Northampton, when a decree was made confirming the trust deed, and ordering the assignees to join in conveying all their estate and interest in the said messuages to the plaintiffs the trustees, or as they should appoint; his lordship being of opinion that as the estate was bound by a specific covenant for further assurance from the bankrupt, they are become entitled to that interest, which, on the bankruptcy and the operation of law thereon, is now vested in the said defendants, the assignees; and the bill filed by the assignees was dismissed with costs. *Edwards v. Applebee*, 1765. 2 *Bro. Ch. Rep.* 652. in notis.

9. The title deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant, 14 years afterwards, upon the eve of a bankruptcy of the mortgagor, took a mortgage, ante-dated; he had notice of the deposit, but avoided inquiring into the purpose for which it was made. The deposit prevailed. 2 *Anstr.* 427. *Hil.* 34 G. 3. *Birch v. Ellames and others*, 98. See *Earl of Deloraine v. Browne*, 3 *Bro. Ch. Ca.* 633. *Smith v. Clay*, in notis.

10. Title deeds were deposited as a security for money; the defendant, a creditor of the mortgagor, fearing his immediate insolvency, took a conveyance of the same premises *without notice* of the deposit. The conveyance was held good. 2 *Anstr.* 433. *Hil.* 34 Geo. 3. *Plumb v. Fluit*.

15 Vin. 452. (M) Proviso. To make Interest Principal, or to enlarge or lessen it.

1. *A.* Lends money upon a mortgage at a certain rate of interest, and afterwards by parol agrees to reduce the rate of interest; this agreement, though not in writing, is binding; but the fact ought to be tried by a jury upon a proper issue. 6 Bro. P. C. 580. 1773. *Lord Milton v. Edgworth and others.*

2. Where a mortgage is at four *per cent.* and a half interest, with a proviso, that if the interest be paid after each half year, before three quarters of a year become due, the mortgagee will accept four *per cent.*; if the mortgagor fails in paying the interest at the appointed time he cannot be relieved. 3 Atk. 519. 1747. *Nicholls v. Maynard.*

3. Where a mortgage is made with a reservation of four *per cent.* interest, and a proviso, that on non-payment thereof within a certain time after it is due, the mortgagor shall pay five, this is but a *nomine pæne* and relievable in equity. *Ibid.*

15 Vin. 452.

(N) Payment or Tender. By whom.

1. *MONEY* due upon a mortgage is a debt of the mortgagor, to the payment whereof his personal estate is primarily liable, (the land being considered only as a pledge,) as between his heir or devisee, and his executor; unless some express, or necessarily implied declaration of his exempts his personal estate and throws the charge upon the real. 6 Bro. P. C. 520. 1772. *Earl of Belvidere v. Rochfort.* See also *Bunb.* 301. *Fereyes v. Robertsou,* and *Walker v. Jackson, in notis,* and 2 Atk. 624. 424. *Ibid.* *Galton v. Hancock.* *Hastlewood v. Pope,* 3 P. Wms. 322, and the cases there cited. *Bridgeman v. Dove,* 3 Atk. 201. *Ambl.* 33. *Lord Inchiquin v. French,* 1 Bro. Ch. Rep. 145. *Samwell v. Wake, Ambl.* 115. *Parsons v. Freeman.* *Woods v. Huntingford,* 3 Ves. 128. *Marchioness Dowager of Tweedale v. Earl of Coventry,* 1 Bro. Ch. Rep. 240.

2. Testator desires all his debts may be discharged by his executors; adding, "I mean those only of my own contracting, not those heavier debts of my family;" gives his personal estate to his mother, whom he makes executrix, desiring her to pay all his just debts exactly. Long after making the will the mother buys in mortgages charged on his estate by his ancestors, and the son covenants to pay the money. The personal estate is still exempted from the principal and interest due on those mortgages, which are still a charge on the real. 1 Ves. 51. 1747. *Leman v. Newnham.*

3. Where money is borrowed on the wife's estate, partly to pay her debts, and partly for the husband's use; he shall not indemnify her estate against any part of it. Otherwise, if it were borrowed

borrowed for his use only, but there is no instance, where the whole is borrowed for the husband, that he is bound to indemnify her estate, if at the same time he made a settlement upon her. *Ambl. 150. 1752. Lewis v. Nangle.*

4. Two persons buy estates subject to a mortgage made by the former owners, they take upon themselves different mortgages, and covenant with each other for the payment of them, they do not by that means make their personal estate liable. *Ambl. 171. 1753. Forrester v. Lord Leigh.*

5. Notwithstanding a charge upon a term for payment of debts, a leasehold estate purchased by the testator, subject to a mortgage, shall bear the burthen of that mortgage, it not being properly the debt of the testator. *1 Bro. Ch. Rep. 454. 1784. Duke of Ancoaster v. Mayo and others. Vide 2 Bro. 57. Earl of Tankerville v. Fawcett, 2 Bro. Ch. Rep. 101. Tweedale v. Tweedale, 3 Ves. jun. 103. Gray v. Minnethorpe, Brummel v. Prothero, Ibid. 111. Read v. Litchfield, Ibid. 475. See also Mr. Cox's note to Evelyn v. Evelyn, 2 P. Wms. 664.*

6. The testator devised his real estate to be sold, and the money to arise by the sale to be applied to pay mortgages and other debts, the residue to be added to his personal estate; and it was decreed to be sold, though there were no express words to exonerate the personal estate. *2 Bro. Ch. Rep. 60. Webb v. Jones.*

7. There being a provision in a settlement of 5000*l.* for a child at 21, the father by will added 5000*l.* more, and charged all on a residuary real fund, which he had also made liable to debts and legacies, in aid of his personal estate; the charged estate shall not be exonerated by the personal estate. *2 Bro. Ch. Rep. 316. Ward v. Lord Dudley and Ward.*

8. Where one devised a rectory for lives, subject to a charge, although the lease be changed by adding new lives, and a bond given by the owners of the lease to the devisee, it continues a charge on the church lease, and not on the personal estate of the obligor in the bond. *2 Bro. Ch. Rep. 604. 1789. Billingshurst v. Walker.*

## (O. 2) Payment or Tender, what is good.

15 Vin. 456.

1. **N**OTICE of paying off a mortgage must be given to the mortgagee at least six calendar months before, and the money must be tendered on the day of the determination of that notice: for where the mortgagee omitted to tender the money on the very day on which the notice expired, and, in consequence thereof, the mortgagee refused the tender, the payment of the interest was held by Lord Hardwicke not to be thereby suspended; for that by the omission of the mortgagor, the mortgagee was become entitled to a further notice of *six calendar months*, at the expiration of which a strict tender must be made. *Hix v. Ling, Powell on Mortgages, 412.*

2. Where there are covenants in a deed of assignment on the part of the mortgagee, he may refuse to take the principal and interest though tendered, till he has an opportunity of advising with his attorney whether he may safely execute. 3 *Atk.* 89. 1744. *Wiltshire v. Smith.*

3. There are several instances of mortgages, where there are many attempts by a mortgagor to pay them off, and reasonable offers of payment; yet if a strict tender is not made, the court cannot stop the interest: though cases may be where the court wish to do it. That of acting a more generous kind of part, if mortgagee had taken it, is not what the court is to go by. *Per Lord Hardwicke*, 2 *Ves.* 372. 1751. *Bishop v. Church.*

4. Interest on a mortgage not stopped, but on a proper tender and notice. Not upon proposals to deduct upon an open account on the other side. 2 *Ves.* 678. 1755. *Garforth v. Bradley.*

15 Vin. 457.

#### (P) Discharged, by what Act.

**I**F a mortgage be found cancelled in the hands of the mortgagee, it is as much a release as a cancelling the bond. 1 *Atk.* 520. 1738. *Harrison v. Owen.*

15 Vin. 457.

#### (Q) Redemption, by whom.

1. **A** Mortgagor may redeem his mortgage, even though he has covenanted, or even taken an oath not to redeem. *Comyns's Rep.* 348. 7 *G.* 1. *East. Term.* *Com v. Atkys.*

2. The crown may redeem estates mortgaged, forfeited for high treason by the mortgagor. 1 *Bro. P. C.* 222. 1708. *Attorney-General v. Crofts and others.*

3. Mortgage by a popish peer may be redeemed by the next protestant kin. *Bunb.* 346. 1739. *Jones v. Meredith and others*, *Comyns's Rep.* 661.

4. One who claims under a voluntary conveyance may redeem a mortgage. *Comyns's Rep.* 669. *Ibid.*

5. A husband may be tenant by the curtesy of an equity of redemption. 1 *Atk.* 603. *Cosborne v. Scarfe and others.*

6. A mortgagee till he is fully satisfied principal, interest, and costs, is not obliged to quit possession to a purchaser. 2 *Atk.* 2. 1737. *Dewy v. Barker.*

7. *G. H.* in 1693 confessed a judgment, but it was not to take place till after the death of a woman who lived till 1726. The estate, subject to this judgment, descended to *J. H.*, who mortgaged it to the defendant, and in 1721 became a bankrupt, five years before the judgment was to take place. *Lord Hardwicke*, Chancellor, held the representative of the judgment creditors, and not the assignee under the commission entitled to redeem, and to have the estate of *G. H.* exonerated out of the estate  
of

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25 Vin. 461.

15 Vin. 464.

## (T) Redemption. On what Terms.

1. **D**EFENDANT has a prior judgment, and a mortgage likewise upon the estate of *B.*; a subsequent judgment creditor, but prior in time to the mortgage, brings his bill, and prays a sale of the mortgagor's estate, who is likewise willing and desirous to sell; but as the mortgagee had no notice of such judgment, the court would not direct a sale in favour of the creditor on the second judgment, unless he would pay off principal and interest on the first judgment and mortgage. 1 *Atk.* 520. 1739. *Sir Hugh Smithson v. Thompson.*

2. Where a mortgagee was present whilst a mortgagor was in treaty for his son's marriage, and concealed his mortgage, the court decreed in favour of the son, the wife, and the issue. 2 *Atk.* 49. 1740. *Bereford v. Milward.*

3. The rule of the court as to prior incumbrancers taking in a subsequent one, so as to tack it to the prior, is where he is a *bond fide* purchaser of the puisne incumbrance without notice of intermediate ones. 2 *Atk.* 53. 1740. *Morret v. Paske.*

4. If a prior mortgagee takes an assignment of a third mortgage, as a trustee only for another person, he shall not be allowed to tack the two mortgages together to the prejudice of intervening incumbrancers. *Ibid.*

5. The reason why a mortgage may be tacked to a judgment is this, because the judgment creditor, by virtue of an *elegit*, may bring an ejectment, and hold upon the extended value; and as he has the legal interest in the estate, the court will not take it from him; but this holds only where the same person has both judgment and mortgage in the same right, and not where he has the judgment in his own right, and the mortgage in another right, as a trustee only. *Ibid.*

6. Where there is a prior mortgagee, who has a puisne incumbrance, a second mortgagee shall not redeem the prior without redeeming the puisne at the same time; and the reason is, because the legal estate is in the first mortgagee, and the court will not take away that benefit from him, provided he had no notice of the second, at the time he bought in the puisne one. *Ibid.*

7. Where a mortgagee has a bond likewise from the mortgagor, the heir must discharge the one as well as the other. *Ibid.*

8. Where a prior incumbrancer has a bond likewise, it shall be postponed to all other incumbrances, whether by mortgage, judgment, or statute staple. *Ibid.*

9. A prior creditor, who buys in a puisne incumbrance, though he did not give the full value, shall be allowed the whole, otherwise as to a trustee, agent, heir at law, or executor. *Ibid.*

10. *Thomas Matthews* gave the plaintiffs at different times three notes, one for 45*ol.*, another for 25*ol.*, and the last for 15*ol.*, and expressed in each to be secured by mortgage on my *Stoke-Hall* estate;

estate; the drawer of the notes had before mortgaged the same estate to the defendant; the plaintiff takes in a prior mortgage to protect the sums lent upon the notes. Lord *Hardwicke* held there was nothing to differ this case from the common one, and that the defendant should be paid the money lent upon the notes in the first place, as well as the money due upon the assignment of the prior mortgage. 2 *Atk.* 347. 1742. *Mathews v. Cartwright*.

11. A prior mortgagee may tack a judgment to his mortgage, though subsequent in time to a second mortgage, provided he has no notice of the second. 2 *Atk.* 352. *Shepherd v. Titley*. 1742. See 2 *Ves* 662. *Anon*, S. P.

12. Lord Chancellor *Hardwicke* said he was inclined to think that the limitation in a settlement to *W. R.* for life, and to the use of the heir male of his body, had created an estate tail in him, and that the plaintiff has not the legal title to the estate, and if he had, that he was not entitled to come into equity for deeds and writings till he had established it first at law, and therefore dismissed the bill so far as it prays to set aside the mortgage, but left him at liberty to redeem the assignee of the mortgage. 3 *Atk.* 291. 1745. *Warrick v. Warrick*.

13. The rule of the court as to a mortgagee, who is likewise a bond creditor, is that he may tack it to the mortgage as against the heir, because assets being descended, he cannot redeem one without paying off the other. 3 *Atk.* 556. 1747. *Powis v. Corbett*.

14. A mortgagee, who lent a further sum upon bond, shall not be allowed to tack it to his mortgage in preference to creditors under a trust created by the will of the mortgagor for payment of debts. 3 *Atk.* 630. 1748. *Heanes v. Baunce*.

15. The reason why the heir of the mortgagor shall not redeem the mortgage, without paying the bond likewise, is to prevent circuity, because the moment the estate descended, it became assets and liable to the bond; the same rule will hold as to a devisee of the mortgaged premises. *Ibid*.

16. Where there is a purchaser for a valuable consideration without notice of a mortgage, the mortgagee cannot tack his bond to it, and he can only have it out of the general assets of the mortgagor. 3 *Atk.* 659. 1747. *Troughton v. Troughton*. 1 *Ves* 46. S. C.

17. A third mortgagee cannot buy in a prior security to displace a second mortgagee after a decree to account, and before the Master has made his report. 3 *Atk.* 811. 1754. *Wortley v. Birkhead*. 2 *Ves* 571. S. C.

18. Where there is a clause of redemption in a separate deed, the court adheres to it strictly to prevent the equity of redemption from being entangled to the prejudice of the mortgagor. 1 *Ves* 160. 1748. *Baker v. Wind*.

19. The husband of tenant in tail takes in a mortgage, and is in receipt of the rents; on a bill to redeem by the reverfioner after the



the wife's death, the husband shall not be allowed interest on the mortgage during the life of the wife. 1 *Ves.* 477. 1750. *Amesbury v. Brown.*

20. A deed of appointment of lands in *Middlesex*, pursuant to a power in a former deed, postponed to a mortgage subsequent to, but registered before it. 2 *Ves.* 413. 1752. *Scraston v. Quincey.*

21. A second mortgagee with notice of a former, but without notice of a trust charge antecedent to both, of which the first mortgagee had notice, must take subject to that demand. 2 *Ves.* 485. 1752. *Earl of Pemfret v. Lord Windsor.*

22. Judgment creditor being plaintiff in equity shall have satisfaction against the heir at law out of a moiety only of the land; but if the heir at law comes to redeem a mortgage, and the mortgagee has a judgment besides his mortgage, he must redeem both. *Amb.* 14. 1743. *Stilwell v. Ashdown.*

23. Two separate mortgages of different estates to the same person: a purchaser of the equity of redemption of one of them cannot redeem the mortgage upon that estate only; he must redeem both. *Amb.* 733. 1773. *Ex parte Cart v.*

24. Executor of a mortgagee lends money to the mortgagor on bond, he may tack the bond to the mortgage as against the heir or devisee of the mortgagor, but not against creditors, if the estate is charged with the payment of debts. *Amb.* 685. 1770. *Price v. Fastledge.*

25. The third mortgagee, buying in the first mortgage *pendente lite*, shall exclude the second. 1 *Bro. Ch. Rep.* 63. 1779. *Robinson v. Davison.*

26. Where the legal estate is in a mortgagee, the subsequent securities shall have priority. 1 *Bro. Ch. Rep.* 353. *Becket v. Cordley.*

27. Mortgagee of a reversion not having the title deeds shall not be postponed to a subsequent mortgagee (whose mortgage was made after the mortgagor came into possession) having the title deeds, there being neither fraud nor negligence. 2 *Bro. Ch. Rep.* 650. 1789. *Tourle v. Rand.* *Vide Penner v. Jemmat, and Edwards v. Applebee, in notis.*

28. Mortgagee having also a bond, cannot tack it against other specialty creditors, though he may against the heir. 3 *Bro. Ch. Rep.* 162. 1796. *Lowthian v. Hasel.* *Hamerton v. Rogers, S. P.* 1 *Ves. jun.* 513.

29. Personal securities pledged for a specific debt after a mortgage to the creditor; the same securities with others were pledged to him for the balance of an account; the transaction being distinct, redemption of the personal securities was decreed without discharging what was due on the mortgage. 2 *Ves. jun.* 372. 1794. *Jones v. Smith.*

30. *A.* engaged with *B.* in one mortgage only, may redeem, though *B.* has pledged another estate to the same person. *Ibid.* 376.

31. Two mortgages to the same person absolute at law; mortgagee may insist that both or neither shall be redeemed by the mortgagor or his assignee. *Ibid.*

32. A bond

32. A bond cannot be tacked to a mortgage against the mortgagor or creditors; but may against the heir, merely to prevent circuity of action. 2 *Ves. jun.* 376. 1794. *Jones v. Smith.*

33. Mortgagee may protect himself against a claim of dower by tacking an assignment of an old mortgage term prior to the right to the dower. 5 *Ves. jun.* 426. 1799. *Wynn v. Williams.*

## (U) Redemption. *At what Time.*

15 Vin. 467.

1. A Redemption of a stale mortgage was decreed after the mortgagee had been in possession 68 years; but this decree being made upon a bill of revivor, was held to be improper, and therefore reversed, without prejudice however to the question, whether the estate was redeemable or not, whenever it should be brought into question by a proper bill. 2 *Bro. Par. Caf.* 44. 1717. *Dame Anna Dorothea Birne v. Hartpole and others.*

2. The heir of a mortgagor brings his bill to redeem an old mortgage. The defendant pleads title as a purchaser for a valuable consideration under a marriage settlement, without notice of the mortgage. The settlement was made by the original mortgagee, and there was a quiet possession for 70 years. The plea was allowed. 4 *Bro. Par. Caf.* 74. 1732. *Lord Dunsany v. Shaw.*

3. Where the mortgage money is stipulated to be paid in one entire sum, and the mortgagee, and those claiming under him, had been in possession for near 100 years without foreclosing; a bill brought to redeem shall be dismissed with costs. 4 *Bro. Par. Caf.* 369. *Hartpole v. Walsh and others,* 1740.

4. On a bill filed to redeem a mortgage, 55 years after the date of it, 47 years after the mortgagee had got into possession, after five ejectments brought to defeat his estate by a title paramount, and after refusing by four different answers to come to account on the foot of the mortgage and redeem the lands; a redemption was decreed, and an account of rents and profits directed. 5 *Bro. Par. Caf.* 194. 1756. *Palmer v. Jackson.*

5. Upon a bill to redeem, it appeared by the plaintiff's own shewing, that the defendant had been in an uninterrupted possession above 34 years, and no incapacity was pretended; a demurrer was allowed. *Bunb.* 55. 1719. *Frazer and others v. Moor.*

6. Mr. North had been in possession as mortgagee since 1686. In the year 1720 a bill was brought by the representative of the mortgagor for a redemption. Mr. North filed a bill for a foreclosure, and upon hearing, the usual decree was made, that he should account, have all just allowances, and be examined on interrogatories, which he was; and it appeared thereby, that the estate was indebted to him above 5000*l.*; now it was moved for the plaintiff, that the defendant should produce all books, writings, and papers relating to the account on oath, which the court ordered

dered as to books and papers, but made no order as to the writings relating to the title. *Bunb.* 288. 1730. *Dean, clerk v. North.*

7. After a possession of a mortgagee for 25 years, the court decreed a redemption, on the defendant's submitting by his answer to be redeemed. 2 *Atk.* 140. 1740. *Profler v. Oates.*

8. Where no demand has been made upon a bond for 20 years, the judge will direct a jury to find it satisfied. 2 *Atk.* 144. 1740. *Gratwick v. Simpson and others.*

9. The representative of Sir T. C. prays to redeem 2500*l.* *East India* stock transferred to the defendant the first of *April* 1708 for securing 2000*l.* and interest at 6 *per cent.*, to be re-transferred on payment of principal and interest the 2d of *July* following. Sir T. C. died 1709; the son brought the bill in 1729. Lord *Hardwicke* refused to decree a redemption, and dismissed the bill. 2 *Atk.* 303. 1742. *Lockwood v. Ewer.*

10. Length of time pleaded in bar to a redemption of a mortgage being made in 1713, the mortgagee's solicitors appearing to have settled an account in 1730, in order to pay off the mortgage; Lord *Hardwicke* held, that that would save the right of redemption. 2 *Atk.* 333. 1742. *Anon.*

11. Coverture is no excuse for not redeeming a mortgage; for if a woman becomes afterwards discover, the stat. of limitations will run from that time. *Ibid.*

12. Tenancy by the curtesy is no excuse, for it is of no consequence to a mortgagee, who has the equity of redemption; if they do not make use of their right, they shall be barred. *Ibid.*

13. Premises are conveyed to a mortgagee, till he shall have received by the rents and profits the money which he has advanced, and interest; this was redeemable after 40 years, for the mortgagee took the estate subject to a perpetual account. 2 *Atk.* 363. 1742. *Kates v. Hambly.*

14. In common *Welch* mortgages, on tendering principal and interest, the person entitled may come into this court for redemption at any time. *Ibid.* See 1 *Ves.* 406.

15. A plea of the stat. of limitations allowed to a bill for redemption after a mortgagee had been in possession of the mortgaged premises 30 years. 3 *Atk.* 225. 1745. *Aggas v. Pickrell.*

16. The rule in relation to redemptions established in equity by way of analogy to the stat. of limitations, is, that after 20 years possession a mortgage should not be disturbed, is a very right and proper one. 3 *Atk.* 313. 1746. *Anon.*

17. A pawnor has time for redemption during life, where no time is given for redemption. 1 *Ves.* 278. 1749. *Kemp v. Westbrook.*

18. If a mortgagee admits having no other title, it shall bind him, and the court will let in the mortgagor to redeem after 20 years; not so, if he claim by a better title. 2 *Bro. Ch. Rep.* 397. 1788. *Perry v. Marston.*

19. Bill

19. Bill against the devisee of mortgaged premises, by the heir of the mortgagor for discovery and redemption, charging acknowledgments that the estate was held in mortgage, and that accounts had been kept: plea of possession for 50 years under conveyances from the mortgagee ordered to stand for an answer. 3 *Ves. jun.* 17. 1795. *Lake v. Thomas.*

20. A mortgaged estate getting into different hands, redemption was refused as to part from length of time, and opened as to the other part, accounts having been kept, and there being a devise of it as a mortgage. *Ibid.*

21. Residuary legatee having been admitted to a copyhold estate, was in possession above 19 years, when the heir obtained possession by ejectment. After acquiescence for 9 years, the residuary legatee filed a bill claiming the estate, as having been a redeemable interest in the testator, and having been treated as such, it was decreed. An account was directed of the money expended in repairs, &c. and inquiries as to incumbrances, the court inclining strongly to support the acts of the heir whilst in possession. 4 *Ves. jun.* 466. 1799. *Hardy v. Reeves.*

22. Baron and feme seised in fee in right of the feme, mortgage by fine, and afterwards convey the equity of redemption by lease and release to the mortgagee, the mortgagee having remained in possession for more than 20 years, during the life of the husband, tenant by the curtesy, the heir of the wife is barred of his equity of redemption by lapse of time. 1 *Anstr.* 138. 33 G. 3. *Corbett v. Barker*, 755. S. C.

(U. 2) Redemption. *How.* In Cases of Eject- 25 Vin. 471.  
ment, &c. by 7 G. 2. c. 20.

**W**HERE a mortgagee brings an ejectment to get possession, and the mortgagor moves to stay proceedings on payment of what is due, and costs: if the mortgagee gives notice of other demands, as cause against the order, he must specify the nature and amount of such demands. 3 *Anstr.* 937. 37 G. 3. *Goodtitle en dem. Leon v. Lousdown.*

(U. 3.) Equity of Redemption. Disposalable. 25 Vin. 471.  
*How, &c.*

1. **Q**UÆRE, Whether a mortgage on real estate can pass by parol gift as *donatio inter vivos*. *Ambl.* 318. 1756. *Hassell v. Tynte.*

2. An equity of redemption may be conveyed by bargain and sale. 2 *Atk.* 15. 1737. *Oldin v. Samborne.*

3. An equity of redemption cannot be taken in execution under the statute of frauds. 3 *Bro. Ch. Rep.* 398. 1792. *Lyfster v. Dolland*, 1 *Ves. jun.* 431. S. C.

4. Whether

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4. Whether there can be an escheat of an equity of redemption, or trust is not yet determined. 2 *Ves.* 304. 1751. *Farwell v. Lowther.*

15 Vin. 471. (W) Account. In what Cases. Mortgagee shall account for the Profits.

1. **A** Mortgagee of a leasehold estate getting possession by ejectment, is liable to the lessor for all arrears of the reserved rent; and where, to exonerate himself, he prevails with the lessor to distrain upon the goods of the lessee, which are already taken in execution by a judgment creditor, he shall pay to such creditor so much as he has been obliged to pay to the lessor, with damages and costs. 1 *Bro. Par. Cas.* 105. 1705. *Traherne v. Saddleir.*

2. The court will not allow a mortgagee more than his principal and interest, notwithstanding the mortgagor has agreed that he shall be paid for his trouble in receiving the rents. 2 *Atk.* 120. 1740. *French v. Baron.* See 3 *Atk.* 518. *Godfrey v. Watson.*

3. The court will not suffer a common mortgage to be redeemed, where the mortgagee has been in perception of the rents and profits for a considerable time, because it would be making the mortgagee bailiff to the mortgagor, and subject to account. 2 *Atk.* 496. 1742. *Mellor v. Lees.*

*But where a mortgagee takes an estate subject to a perpetual account, as in the case of common Welch mortgages, he cannot be relieved against his own contract.* 2 *Atk.* 363. 1742. *Yates v. Hambly.*

4. A lease of 60 years which had been granted as a collateral security to a recognizance for 3500*l.* being expired, the plaintiff by his bill prayed to be let into possession, and the security might be vacated, or satisfaction entered on record: the account was directed to be taken of the rents which have accrued since the expiration of the lease and received by the defendant, and to be deducted out of the principal interest and costs, and the plaintiff decreed to be entitled to a conveyance of the inheritance of the estate in question, and possession, on payment of what shall be found due. 3 *Atk.* 261. 1743. *Toomes v. Conset.*

5. It is the constant practice of the court in decrees against a mortgagee, upon a bill for redemption, or against an executor to account, to direct it without future words, viz. to account for what they had received, or might have, if it had not been for their own default; and yet if the person decreed to account receive any thing subsequent to the decree, it is inquirable before the Master, and the defendants in each case must bring the sums received to account. 3 *Atk.* 582. Nov. 1747. *Bulstrode v. Bradley.*

## (X) Allowances to Mortgagee.

15 Vin. 474.

1. THE court will not allow a mortgagee more than his principal and interest, notwithstanding the mortgagor has agreed he shall be paid for his trouble in receiving the rents.

2 *Atk.* 120. 1740. *French v. Barron.*

2. Where a mortgagor of a leasehold estate has not covenanted that he will procure the lives to be filled up, the mortgagee may do it, and on adding the expence of renewal to the principal of the mortgage it shall carry interest. 3 *Atk.* 4. 1743. *Lacon v. Mertins.*

3. Mortgagee may add to the principal of his debt a sum expended in support of the mortgagor's title, where it is impeached, and it shall carry interest. 3 *Atk.* 518. 1747. *Godfrey v. Watson.*

4. A mortgagee shall not be allowed for his trouble in receiving the rents of the estate himself, but if the estate lies at such a distance as obliges him to employ a bailiff to receive them, what he paid to the bailiff shall be allowed. *Ibid.*

5. Bill to redeem a mortgage. It was referred to the Master to take the usual accounts. The principal money lent, carried 5 per cent. interest. The mortgagee being in possession, had advanced money for fines on renewals of leases, under which the premises were held. Upon these sums the Master allowed only 4 per cent. interest. On exceptions, the court said, that interest upon the advances must be regulated by the interest payable upon the money originally lent. 2 *Anst.* 551. 35 *Geo.* 3. *Woolley v. Drag.* See 2 *Atk.* 330. *Thornhill v. Evans.*

6. A mortgagee had also a bond, on which the interest due exceeded the penalty; the mortgagor conveyed the equity of redemption for the use of his creditors, paying this bond first, nothing beyond the penalty can be allowed. 2 *Anst.* 525. 33 *G.* 3. *Lloyd v. Hatchett.*

## (X. 3) Interest upon Interest. Or how much.

15 Vin. 474.

1. AN arrear of interest remaining due at the time of assigning a mortgage shall not carry interest. 2 *Bro. Par. Ca.* 56. 1717. *Everard v. Aston.*

2. A. made a mortgage to B. for 1769*l.* payable by five equal payments within the space of five years, with interest at 5 per cent. But the mortgagor covenanted, that if the money was not paid at those times, or within three months after, he would, for every sum so paid pay the mortgagee interest after the rate of 8 per cent. until actual payment. The money was not paid according to the terms of the deed, and therefore the mortgagee filed a bill to foreclose. The court decreed an account of the principal money and interest at 5 per cent. only; but on appeal this decree was reversed, and the mortgagor was ordered to be charged at 8 per cent.

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cent. from the end of three months after each payment became due. 3 Bro. Par. Ca. 68. 1725. *Burton and others v. Hattery.*

3. A mortgagee, where the mortgage was only at four and a half per cent. compelled the mortgagor to turn the interest into principal at five per cent. at the end of every six months, and at the time the mortgage was paid off insisted on an advance of six months interest, over and above the interest which was due; the bill was brought for relief against the mortgagee, and to set aside the grant to the defendant of the place of steward to a manor of the plaintiff's, as obtained by fraud. Lord *Hardwicke* Chancellor, relieved the plaintiff both in respect of the transactions relating to the mortgage, and also in regard to the grant to the stewardship. 2 Atk. 330. 1742. *Thornhill v. Evans.*

4. An agreement to turn interest into principal must be done fairly, and on the advance of fresh money. *Ibid.*

5. The court will not suffer a counsel to maintain an action for fees, or if he happen to be a mortgagee, to insist on more than legal interest under pretence of gratuity for business done in the way of counsel. *Ibid.*

6. Though interest be in arrear when the mortgage is paid off, a mortgagee shall not have interest for that interest. *Ibid.*

7. If a mortgage be drawn for 5 per cent. and a mortgagee take 6, it would be void on the word take in the stat. 12 Ann. 3 Atk. 154. 1744. *Adlington v. Cann.*

8. The defendant, the assignee of two judgments, which were prior in point of time to the plaintiff's mortgage, is entitled to have interest on the whole money, the accumulated sum which he paid for those two judgments. 3 Atk. 270. 1745. *Aspenhurst v. James.*

9. Where a mortgage is assigned with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal and carry interest; otherwise if assigned without the mortgagor's consent. *Ibid.*

10. A judgment creditor in possession of the estate, and prior to a mortgage assigns his judgment; the assignee's possession is from the date of the assignment only, but the rents he has received, shall be deducted out of what shall be reported due to him for principal, interest, and costs. *Ibid.*

11. Where a mortgagee has tacked a judgment to his mortgage he shall not be confined to the penalty of the judgment, but is entitled to interest upon the debt secured by judgment, though it exceeds the penalty. 3 Atk. 518. 1747. *Godfrey v. Watson.*

12. Prior incumbrancer cannot turn the interest into principal to the prejudice of a subsequent incumbrancer after notice. *Ambt.* 612. June 1763. *Digby v. Craggs.*

15 Vin. 475. (Y) Foreclosure. In what Cases, and of what, &c.

1. THE father of Mr. *Lutwich* the counsel, had a mortgage in fee on Sir *Wm. Perkin's* estate, who was attainted, the son of Mr. *Lutwich* brought his bill to foreclose, and made the At-  
torney-

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*Attorney General* a party: the court would not decree a foreclosure against the crown, but directed the mortgagee should hold and enjoy till the crown thought proper to redeem the estate. 2 *Atk.* 223. 1741. *Reeve v. The Attorney-General.*

2. It is not necessary to bring a bill of foreclosure on a mortgage of stock. 2 *Atk.* 303. 1742. *Lockwood v. Ewer.*

3. Bill of foreclosure against tenant for life and first tenant in tail; the time for redemption after several enlargements elapsed, and the tenant in tail released; held, the remainder-man was bound by the foreclosure and release. *Amb.* 564. 1769. *Reynholdson v. Perkins.*

4. Foreclosure of the first tenant in tail will bind the remainder-man. *Ibid.*

5. Mortgagee, when the personal estate is insufficient, may pray a sale of the mortgaged premises in the first instance, where the heir and the personal representative are the same person. 2 *Bro. Ch. Rep.* 155. 1787. *Daniel v. Skipwith.*

6. A trustee laid out money of different persons on a mortgage, foreclosure may be by one *cestui que trust* as to his share. 3 *Ves. jun.* 560. 1797. *Montgomerie v. Marquis of Bath.*

7. Mortgagee having permitted the tenant for life to run in arrear for the interest, purchases the estate for life, and takes possession under that purchase: he is bound to apply the surplus rents and profits beyond the current interest in discharge of the arrear; and in the account under the foreclosure was charged accordingly. 5 *Ves. jun.* 99. 1799. *Lord Penrhyn v. Hughes.*

8. Mortgagee cannot be compelled to take possession, but may foreclose. *Ibid.*

### (Z) Foreclosure. Opened in what Cases.

15 Vin. 477.

**M**OTION for further time to redeem a mortgage, and that it should stand as a security only for what was *bonâ fide* advanced, but forfeited as to what was won at play. *Per Lord Hardwicke* Chancellor. As Mr. *Fleetwood* in a former cause, where he might have done it, did not insist on a redemption, the foreclosures could not regularly be kept open, but on the whole circumstances his lordship allowed three months. 2 *Atk.* 467. 1742. *Fleetwood v. Janson.*

### (C. a) Pleadings in Law and Equity relating to Lands mortgaged.

15 Vin. 478.

1. IF a term is assigned by way of mortgage, with a clause of redemption, the lessor cannot sue the mortgagee as assignee of all the estate, right, title, interest, &c. of the mortgagor even after the mortgage has been forfeited, unless the mortgagee has taken a *Actual* possession. *Eaton v. Jacques.* 2 *Dougl.* 455.

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2. The plaintiff as mortgagee got possession of the estate, sued at law on the covenant for non-payment, and brought this bill to foreclose; this is regular, and the court will not stop the proceedings at law unless the defendant brings the money into court. *Rees v. Parkinson*, 2 *Anstruther's Rep.* 497.

3. On a bill to redeem, the mortgagee cannot object that the bill does not state a valid legal conveyance to him. *Robert v. Clayton*, 3 *Ibid.* 715.

4. Where a mortgagee brings an ejectment to get possession, and the mortgagor moves to stay proceedings on payment of what is due and costs; if the mortgagee gives notice of other demands, as cause against the order, he must specify the nature and amount of such demands. *Goodtitle ex dem. Leon v. Lansdown*. 3 *Ibid.* 937.

5. The mortgagee of a ship cannot maintain an action for freight against a third person before he takes possession. *Chinnery v. Blackburne*, 1 *H. Bl.* 117. (n).

6. A mortgagor shall never be permitted to dispute the title of his mortgagee. *Per Lord Mansfield. Goodtitle v. Bailey*, 2 *Comyns*, 601.

7. If a road act (9 G. 3. c. 89.) require notice in writing to be given to mortgagees of lands wanted, in order to compel them to assign their interest, it is not sufficient in an order of sessions to say that due notice was given, but it ought to be stated to have been given in writing. *Rex v. Croke*, 1 *Comyns*, 30.

8. Such defective notice would not be cured by the appearance of the party. *Ibid.*

9. Ejectment will lie by a mortgagee against a tenant under a lease from the mortgagor subsequent to the mortgage without notice to quit. *Keech v. Hall*, 1 *Dougl.* 21. But if there is a tenant from year to year, and the landlord mortgages preceding the year, the tenant is entitled to six months notice to quit from the mortgagee. *Ibid.* 21. (n).

10. A tenant, under a lease from the mortgagor prior to the mortgage, shall not set it up against the mortgagee in ejectment, if he has notice that the mortgagee only means to compel him to attorn. *White v. Hawkins*, *Ibid.* 23. (n).

11. In the case of *Head v. Egerton* it was said by the Lord Chancellor, "That in the defendant's pleading of a mortgage or purchase he ought to shew, that the vendor or mortgagor being, or pretending to be, seized in fee of the premises, did make such conveyance or mortgage, &c., otherwise the person undertaking to sell or mortgage may be a mere stranger and have no interest in the premises, though he takes upon him to sell or mortgage them." 3 *P. Wms.* 281.

12. In ejectment by a mortgagee, for the recovery of the possession of the mortgaged premises, or in debt on bond conditioned for the payment of the mortgage money, or performance of covenants in the mortgage deed, where no suit in equity is depending for a foreclosure or redemption, it is enacted by the stat. 7 G. 2. c. 20. §. 1. that "if the person having a right to redeem shall, at

any time pending the action, pay to the mortgagee, or in case of his refusal, bring into court, all the principal monies and interest due on the mortgage, and also costs to be computed by the court, or proper officer appointed for that purpose, the same shall be deemed and taken to be in full satisfaction and discharge of the mortgage, and the court shall discharge the mortgagor of and from the same accordingly." Upon this statute the proceedings in ejectment on a mortgage may be stayed by the mortgagor, or his assignee of the equity of redemption, on payment of the principal, interest, and costs, without paying off a bond debt due to the mortgagee. *Archer v. Snatt*, 2 Str. 1107. *Andr.* 341. S. C.

13. And if there be any doubt as to the amount of what is due, the court will refer it to the Master who taxes the costs, and if the debt and costs are not paid, the plaintiff must proceed in the action, and cannot have an attachment. 2 Str. 1220.

14. But the court will not stay proceedings in an ejectment brought by a mortgagee against a mortgagor on payment of the principal, interest, and costs, if the latter has agreed to convey the equity of redemption to the mortgagee. *Goodtitle dem. Taysum v. Pope*, 7 Term Rep. 185. But vide *Skinner v. Stacy*, 1 Wils. 80.

For more of Mortgage in general, see *Fraud*, *Incumbrances*, and other proper titles.

## Mortmain.

### (B) What is Mortmain.

15 Vin 484

1. **D**EVISE to charitable uses under a will in 1734, the testator lived till July 1736, a month after the new stat. of mortmain took place, and then dies without revoking his will. It was referred by the court of Chancery to the judges for their opinion, whether this was a good disposition to charitable uses; and all of them, except Mr. Justice Denton, who was ill, certified that the devise to these uses was good in law, notwithstanding the act; and thereupon the Lord Chancellor declared the will should be established, and the trusts thereof carried into execution. 2 Atk. 36. 1740. *Asbburnham v. Bradshaw*, 1 Ves. 33. *Attorney-General v. Lloyd*, S. P. 1 Ves. 178. and 186. *Willet v. Sandford*, S. P. Amb. 550. *Attorney-General v. Downing*.

2. The owner of land charged with an annuity for the payment of a schoolmaster, will not be excused from the payment thereof on account of there being no schoolmaster for six years. 2 Atk. 238. 1741. *Aylet v. Dadd*.

3. Though there are not persons in the parish sufficient to answer the description of a charity, yet the land charged with the payment is not discharged during that time. *Ibid.*

4. Two hundred pounds were given under the will of Mr. Lane to the ward of *Bread-street* according to Mr. ———'s will. Bill by the aldermen and principal inhabitants of the ward to have the directions of the court for the application of this charity, and the Attorney-General was made a defendant. And the money was decreed to be disposed of in such charities as the aldermen and inhabitants of the ward should think most beneficial. 2 *Atk.* 239. 1741. *Baylis and others v. Attorney-General.*

5. Sir John Tash devised copyhold lands in charity, that he had before surrendered to the use of his will, which consisted of eleven sheets, the two first of which he signed, and died before he signed the rest: there were no witnesses. Lord Hardwicke held it to be a good appointment of the copyhold estate for the charity, under the stat. 43 Eliz. 2 *Atk.* 497. 1742. *Attorney-General v. Sawtell.*

6. There must be a will duly executed to create a charitable use, and the court will not set up a trust for a charity without a declaration in writing; for in this case Lord Hardwicke held that charitable uses are within both the clauses of the *statute of frauds and perjuries*, as well within the clause of devises as the clause relating to the declaration of trusts; and notwithstanding there were circumstances, which shewed the inclination of the testator here, that some part of his estate should go to charitable uses, yet he did not think the evidence arising from thence certain enough to decree this to be a trust for charity, and that admitting parol evidence to prove it, would be breaking in upon the statute, the statute of mortmain not having abrogated the statute of frauds. 3 *Atk.* 141. 1744. *Adlington v. Cann and others.*

7. W. B. by will the 3d of May 1745, gave 500*l.* to T. W. and J. B. on trust to lay out 200*l.* in building a school-house, &c., and the remaining 300*l.* to be laid out in land or some real security, to be a maintenance for the master: the executrix refusing to pay the 500*l.*, an information in the name of the Attorney-General to have the trusts of the will, in respect to this charity, carried into execution. What the testator has directed to be done, with regard to the 300*l.*, is contrary to the *stat. of mortmain* 9 Geo. 2., and void; but the 200*l.* may be laid out in building a school-house on any lands in the village of N., which lands already belong to some charity, but not in the purchase of lands. 3 *Atk.* 806. 1754. *Attorney-General v. Bowles*, 2 *Ves.* 547. S. C.

8. Devise before the *mortmain act* of lands in trust for a charity; a codicil after the act devising the same lands to the same trustees, and to two others to the same charity, making alterations in other parts of the will, confirming the rest, and declaring the codicil to be annexed, &c. to the will. The devise to the charity not void. 1 *Ves.* 178. and 186. 1748. *Willett v. Sandford*, vide *Ambl.* 451. *Attorney-General v. Heartwell*, S. P. contra.

9. John

9. *John Elbridge* being likely to die, made a conveyance of a real estate for the benefit of a charity: ten days afterwards he makes a will; by which he gives 3000*l.*, the exact value of that land, to the same charity, and 250*l.* to the same; and gives the estate to *Mrs. Elbridge*, wife of *Thomas Elbridge*, and to *Mr. Wolner* as tenants in common. After his death a bill is filed for an account, and for directions as to the settlement of *John Elbridge's* estate under his will, and for a decree for that purpose. The court directed the Master to receive a scheme for carrying it into execution; the foundation of a part of which was to consider in what way the money should be laid out, and a perpetual fund created for the maintenance of the charity. The Master reported a scheme for laying out the 3000*l.* in the purchase of these lands; and the 250*l.* in other lands convenient for building the charity-school. The report was confirmed, *Thomas Elbridge* and his wife who survived him acquiescing therein. After her death the information was filed on behalf of the charity, together with *Mrs. Hort*, administratrix of the personal estate of *Mrs. Elbridge*, to have the purchase carried into execution by the aid of the court, against the devisee of the heir at law of *Mrs. Elbridge*, and against the infant son of *Mr. Wolner*, who was dead, having settled the estate on himself in tail. The court refused to decree the order made on the Master's report to be carried into execution. 1 *Ves.* 218. 1748. *Attorney-General v. Day*.

10. A copyhold not surrendered to the use of the will devised to a charity held good, notwithstanding the *stat. of frauds*, amounting to a direction to the heir to make a surrender: but it is also good by way of appointment by 43 *Eliz.*, under which a devise of lands in tail, though no recovery, is good. 1 *Ves.* 225. 1748. *Attorney-General v. Andrews*.—Note, this will was before the *stat. of mortmain*.

11. Devise of money to be laid out in land for an annuity to a minister to preach an annual sermon, and keep a tombstone and inscription thereon in repair, and to be a corporation for keeping account thereof, void by the statute of mortmain. 1 *Ves.* 320. 1749. *Durour v. Matteux*. *Ambl.* 643. 1767. *Gravenor v. Hallum*, *ibid.*

12. Mortgagee in possession under a writ *habere facias possessionem* devises to a charity all money due by mortgage, this is within the *stat. of mortmain*, 9 *Geo.* 2.; and the information which was filed to carry the charity into execution was dismissed. 2 *Ves.* 45. 1750. *Attorney-General v. Meyrick*, 3 *Bro. Ch. Rep.* 373. *Attorney-General v. Earl of Winchelsea*, 4 *Ves. jun.* 21. *White v. Evans*.

13. *Jane Churchill* devises her real estate to be sold: the profits to be applied to the uses of the will: directs her debts and legacies to be paid out of the personal estate; makes the trustees executors; and leaves them all the residue of her personal estate and of that money, which should arise by sale of the real, to be given in what charities they should think proper. This devise of the residue

due is void by the stat. of mortmain, and the court would not marshal the assets to support it. 2 *Ves.* 52. 1750. *Mogg v. Hodges.*

*Legacy to A. and B. who are appointed executors, and land devised to C., paying 1000l. to the executors, the residue to a charity. This 1000l. is a charge on real estate, which, by the statute of mortmain, is void, and results to the heir. 1 Vel. 108. 1748. Arnold v. Chapman.*

14. The residue of personal estate devised to build an hospital: this devise is not within the statute of mortmain: but where the remainder over of real estate was given to a charity, the devise was within the statute. 2 *Ves.* 182. *Vaughan v. Farrer.*

15. Devise of lands to be sold, and the residue of the money, after payment of debts, &c. to a charity, the devise is within the stat. of mortmain, and void. *Attorney-General v. Lord Weymouth, Ambl.* 20. 1743.

16. Devise of the residue of real and personal estate to a charity: it consisted, *inter alia*, of a leasehold estate: void as to the leasehold. *Ambl.* 155. 1752. *Attorney-General v. Graves, Ambl.* 216. 1754. *Attorney-General v. Tomkins.*

17. Legacy to establish a *yeshuba* for instructing Jews in their religion. Question, Whether the sum given should belong to the testator's next of kin, or was a charity to be disposed of by the crown? And a distinction was taken by Lord *Hardwicke*, Chan., that when the devise is to a superstitious use, and made void by statute, or to a charity, and made void by the stat. of mortmain, there it should belong to the heir at law or next of kin: but where it is in itself a charity, but the mode in which it is to be disposed of is such, that by the law of *England* it cannot take effect, as in the present case, it promoting a religion contrary to the established one, the crown by sign manual directed to the Attorney-General may give orders as to the disposal of it. *Ambl.* 228. *De Costa v. De Pas.* 1754. *Attorney-General v. Herrick, Ambl.* 712. S. P.

18. Devise of money to a charity, with directions that it be laid out in the public funds till the whole can be laid out in the purchase of lands to the satisfaction of his trustees, not within the stat. of mortmain. *Ambl.* 210. 1754. *Grimmett v. Grimmett, Sresby v. Hellins, and Grayson v. Atkinson, cited there.*

19. *Christopher Tancred*, by lease and release 1st and 2d of June 1721, conveyed part of his real estates in default of issue of his body, to the use of the masters of *Christ* and *Caius* College, the President of the College of Physicians, the Treasurer of *Lincoln's Inn*, the Master of the Charter-house, and the Governors of *Chelsea* and *Greenwich* Hospitals, and their successors, in trust, to pay yearly for ever the sum of 50l. a-piece to twelve young persons of 16 years of age, four of which were to be educated in the study of divinity at *Christ* College, four in physick at *Grenville* and *Caius* College, and four in the study of the common law in *Lincoln's Inn*, to be paid to them until they shall have their respective degrees of Bachelor of Arts, Bachelor of Physick, and Barrister at Law, and three years after such degrees, and no longer;

longer; to be called *Tancred's Students*. He afterwards by will, 20th May 1746, gave other real estates to the same trustees, to pay the profits in equal proportions to the said 12 students, provided, that if the mortmain act should prevent the disposition of his land, and impede the premises devised to the said 12 students, then, and not otherwise, he devised the premises not limited by the settlement to the 13 Fellows of *Christ*, and the Fellows of *Caius*, and the scholars of both colleges. The court was of opinion, that all the charities given by the deed were within the stat. 43 *Eliz.* With respect to the will, the court was of opinion that a devise to fellows and scholars of a college is within the exception in the stat. of mortmain, 9 *Geo. 2.*, and good; and that the colleges are entitled to so much of the rents as was designed for the four students of *Lincoln's Inn*. *Ambl. 351. 1757. Attorney-General v. Tancred.*

20. Testator being possessed of a lease from the crown for years, of the right and power of laying chains in the river *Thames*, between *Bucby's hole* and *London-bridge*, for mooring of ships, and of all profits to arise therefrom, devised the same to charitable uses. This is within the stat. of mortmain. *Ambl. 367. 1758. Negus v. Coulter.*

21. Rector of a parish bequeaths two sums of money to be laid out in building a parsonage house, not within the stat. of mortmain. *Ambl. 373. 1759. Glubb and others v. Attorney-General and others.*

22. Legacy to the poor inhabitants of *St. Leonard's, Shoreditch*, good, and to go to the poor not receiving alms. *Ambl. 422. 1762. Attorney-General v. Clarke.*

*Legacy to the poor, there were no words in the will to shew what poor the testator meant; but it appearing, that the testator was a French refugee, the court directed the legacies to be paid to the poor refugees. Attorney-General v. Mauce, July 1728. cited in the above case. So where the bequest was for the benefit of poor dissenting ministers living in any country, it being in proof that there are three distinct societies of dissenters, and that collections are made for the poor ministers in each, it was held to go to the poor ministers of each society. Ambl. 524. 1765. Waller v. Childs.*

23. Devise of lands to build and endow a college is good. *Ambl. 550. 1766. Attorney-General v. Downing.*

24. Devise of freehold and leasehold premises to be sold, and out of the money to buy land, and build an alms-house, &c. Void both as to the buying the land, and building an alms-house. *Ambl. 614. 1763. Attorney-General v. Tyndall, 1 Bro. 444. S. C.*

*In case the particular charity directed could not take place, the testatrix directed the money to be laid out in such charitable uses as near to the testatrix's intentions as could be, and the laws would permit—see d. Ibid.*

25. Bequest of the remainder of testator's effects, annuities, mortgages, &c. to a charity. The devise of the mortgages, though not in fee, is void, but being part of the enumerated residue, the court will order them to be first applied in payment of debts, before any other part of the personal estate, to leave a larger fund

for the charity. *Ambl.* 635. 1776. *Attorney-General v. Caldwell.*

26. Richard Widmore, by his will 30th October 1764, gave to the Corporation of *Queen Ann's Bounty* the sum of 200*l.* to augment some poor vicarage in the counties of *Bucks* or *Southampton*. The court was of opinion that the legacy could not be supported, inasmuch as it must of necessity, by the rules of the corporation, be laid out in land. *Ambl.* 636. 1766. *Widmore v. Woodroffe*, 1 *Bro.* 13. S. C.

27. Devise of lands to be sold, and part of the money arising by sale to go to *charitable uses*, and the residue of the money was given over. So much of the money as was given in mortmain lapses to the heir at law. Bequest of an annuity out of land to churchwardens to keep a vault in repair, is void at law, but the heir at law shall be subject to the trust. *Ambl.* 643. 1767. *Gravenor v. Hallum.*

28. Legacy to be laid out in repairing a free chapel, is not within the stat. of mortmain. *Ambl.* 651. 1767. *Harris v. Barnes and others.*

Not a legacy to repair a *parsonage-house*, 1 *Bro. Ch. Rep.* 444. *Attorney-General v. Bishop of Chester.*—Nor a legacy to build a *parsonage-house*, where no land is to be purchased. *Brodie v. Duke of Chandos*, 1 *Bro.* 444. in notis. *Attorney-General v. Bishop of Oxford*, *ibid.* But money given to erect a *school-house*, where there is no land to erect it on, is void. *Attorney-General v. Hutchinson*, *ibid.* *Pelham v. Anderfon*, *ibid.*—*Vide Ambl.* 373.

29. Bequest of 1000*l.* by sale of lands to be applied in water-works for the use of the inhabitants of a town, is within the stat. of mortmain. *Ambl.* 651. 1767. *Jones v. Williams.*

30. Devise of money to the minister and churchwardens to erect a free school in the parish, void. *Ambl.* 751. 1775. *Attorney-General v. Hyde and others.*

31. Archibald Hutchinson bequeathed money upon mortgage to a charity in *Ireland*, his wife, who was executrix, by her will affirming that bequest; held to be an admission of assets of the testator, and therefore good though out of land. 1 *Bro. Ch. Rep.* 271. 1783. *Campbell v. Earl of Radnor.* See *Attorney-General v. Meyrick*, 2 *Ves.* 45.

32. Money bequeathed to be laid out in the purchase of heritable securities in *Scotland* for a charity, not within the stat. of mortmain. 1 *Bro. Ch. Rep.* 571. 1784. *Attorney-General v. Hendrie.*

33. Devise of freehold houses to eight poor persons of a parish, the gift being void, a personal fund attached to the freehold is void also by the stat. of mortmain, and the court will not apply the gift to any other purpose. 2 *Bro. Ch. Rep.* 428. 1788. *Attorney-General v. Goulding.*

34. Devise of estates to trustees for the use of *University College Oxford*, to buy advowsons; the college having as many as allowed by the stat. of mortmain, the devise shall be performed by exchange of advowsons or otherwise *cy pres*; the heir at law being disinherited

disinherited where the gift is good at the time. 2 *Bro. Ch. Rep.* 492. 1789. *Attorney-General v. Univ. Coll. Oxon.*

35. Residue of personal estate given by testatrix to trustees "to cause to be erected and built a dwelling-house to be appropriated to the use of a school-house;" and her trustees were directed to purchase land for that purpose, the trustees purchased, and with their own money, which they offered to give to the charity: to a bill praying that the charity might be carried into effect, a demurrer on the ground that the charity legacies were void, was allowed. 3 *Bro. Ch. Rep.* 588. 1792. *Attorney-General v. Nash.*

36. A bequest of money to be laid out in land to support the preachers of two chapels, is a charitable use within the *stat. of mortmain*. *Grievous v. Case*. 1792. 4 *Bro. Ch. Rep.* 67. 1 *Ves. jun.* 548. S. C.

37. Money to be invested until an eligible purchase can be had, is a devise of land, and void. *Ibid.*

38. Gift of part of the fund to *A.* and *B.* who were then the preachers, with directions for their continuing to preach, is part of the general plan, and therefore void. *Ibid.*

39. Bequest of real and personal estate to a trustee to take a house for a school to educate children and grandchildren of particular persons, and other children, good as to the particular objects, but bad as a general charity. 4 *Bro. Ch. Rep.* 394. 1793. *Blandford v. Fackerell*, 2 *Ves. jun.* 238. S. C.

40. *A.* before the *stat. of mortmain*, gave real and personal estate to a use, which would be within the *stat.*, and to other uses, which would not be affected by it. *B.*, after the *stat.*, gave personal estate to the uses of *A.*'s will; the estate of *A.* being sufficient for the first use, the whole of the second gift shall go to the valid use. 4 *Bro. Ch. Rep.* 412. 1793. *Attorney-General v. Hartley.*

41. Gift of personalty to establish a school, good notwithstanding the *stat. of mortmain*. 4 *Bro. Ch. Rep.* 526. 1794. *Attorney-General v. Williams.*

42. Bequest to the society for increasing clergymen's livings in *England and Wales* for the perpetual purpose of increasing their livings. The Governors of *Queen Anne's Bounty* alone answer that description; and as all their funds are laid out in land, the bequest is void by the *stat. of mortmain*. 3 *Ves. jun.* 734. 1798. *Middleton v. Clitherow.*

43. Mortgage of turnpike tolls is within the *stat.* 9 *Geo. 2. c. 36.* 4 *Ves. jun.* 430. 1798. *Knapp v. Williams, in notis.*

44. Legacy to the trustees of a chapel for Protestant dissenters, to be applied by them towards the discharge of the mortgage on the said chapel, is void under the *mortmain act*. The mortgage having been paid off by other funds in the testator's lifetime, the court would not say, the legacy might not have been applied in repairing or sustaining the chapel, but was of opinion it could not be



be applied to any other charitable purpose. 4 *Vef. jun.* 418. 1799. *Corbyn v. French.*

45. Bequest of money to enable trustees for a charity to complete a contract for the purchase of land, is void by the stat. of mortmain. *Per Sir Rd. Arden*, Master of the Rolls. *Ibid.* 431.

46. Specific disposition by will in trust to sell, and in the first place to pay debts, legacies, and funeral charges, and charges of the probate, and execution of the trust; and in the next place that the residue of the money be appropriated to the improvement of the city of *Bath*, is void by the stat. of mortmain. 4 *Vef. jun.* 542. 1799. *Howse v. Chopman.*

## [ G ]

## Motion.

35 Vin. 495. (A) Motion in Court. What may be done upon Motion, &c.

The letter (a) is used to denote that the rule is absolute in the first instance; the letter (s) that it is drawn up on the signature of counsel; the letter (c) that it cannot be had without consent; and the letter (n) that in the first instance it is only a rule nisi.

1. **MOTIONS** are of a *civil* or *criminal* nature. Of the latter kind is a motion for an *attachment*, which may be moved for on account of contemptuous words spoken of the court (a) or its process (n); for a rescue (n), or disobedience to a subpoena, or other process (n); against a sheriff for not returning the writ, or bringing in the body (a); against an attorney for not performing his undertaking or otherwise misbehaving himself (n); against other persons for non-payment of costs on the Master's allocatur (a); for the non-payment of money generally (n); or not performing an award, &c. (n).—Motions of a civil nature are made on behalf of the plaintiff or of the defendant. On behalf of the plaintiff they are either 1st, for something to be done in the common and ordinary course of the suit as to increase issues (a); for a *concilium* (a s) or judgment on demurrer, special verdict, or writ of error (a); for leave to enter up judgment on an old warrant of attorney (a), or *nunc pro tunc* (n); to enter up judgment and take out execution after an award, where a verdict has been taken for the plaintiff's security (n), or after a verdict for the plaintiff against one of several underwriters where the rest have agreed to be bound by it (n), or to take out execution pending a writ of error (n), to amend the pleadings or other proceedings in the course of a suit (n), or to set aside a judgment of *nonpross*, or of *nonsuit* (n), or a verdict or inquisition (n). Or, 2dly, They are for something to be done out of the common and ordinary course of the suit, as for the defendant to abide by his plea (a s), to refer it to the Master to assess the damages without a writ of inquiry (n); for the execution of a writ of inquiry before a judge (n), or to have a good

good jury upon the execution of such a writ (*a*); for a trial at bar, or in an adjoining county (*n*); for a view in trespass (*s*), in other cases (*n*), or special jury (*s*); to have witnesses examined on interrogatories (*c*); or for leave to inspect and take copies of books, court rolls, &c. or to have them produced at the trial.—On behalf of the *defendant*.—Before declaration, they are to quash the writ (*n*), justify bail (*a*), reverse an outlawry (*n*), or, after several rules for time to declare, that the plaintiff declare peremptorily (*a*).—*After declaration*, they are to set aside an interlocutory judgment for irregularity, as being signed contrary to good faith, or upon an affidavit of merits (*n*), to set aside or stay proceedings in actions upon bail bonds, or in other actions if irregular or unfounded (*n*), and if the defendant is a prisoner to discharge him out of custody upon common bail (*n*); or if the proceedings are irregular to stay them upon terms (*n*), to compound penal actions (*c*), change the venue (*a*), consolidate actions (*n*), or strike out superfluous counts (*n*), for time to plead or reply, &c. under special circumstances (*n*); to plead several matters, or pay money into court (*s*), to withdraw the general issue and plead it *de novo*, with a notice of set-off; or upon paying money into court, to add or withdraw special pleas, all these are generally (*a*) but sometimes (*n*); to pay the issue money into court in a *qui tam* action (*n*); to put off a trial if the defendant is not ready (*n*), or if the plaintiff will not proceed to trial (*a*), or inquiry (*a*), or for judgment as in case of a nonsuit (*n*); in arrest of judgment (*n*); or for a suggestion after verdict to entitle the defendant to costs (*n*); to set aside an execution and discharge the defendant or restore to him the money levied, or retain it in the sheriff's hands (*n*). 1 *Tidd's Pract. K. B.* 401.

2. There are some motions peculiar to the action of *ejectment*, such as for judgment against the casual ejector generally (*s*), but where there is any thing peculiar in the service of the declaration, it should be mentioned to the court, and where the affidavit of service is defective, they will give leave to file a supplemental one;—that service on the tenant's son, daughter, &c. may be deemed good service (*n*) for the landlord to be admitted defendant instead of the tenant (*s*), or for leave to take out execution in such case against the casual ejector, after the landlord has failed in his defence. 1 *Tidd's Pract. K. B.* 410.

3. There are also other motions not necessarily connected with any action, as to set aside an annuity, and deliver up the securities to be cancelled, &c. (*n*). *Ibid.*

4. By the annuity act, 17 G. 3. c. 26. s. 4., the court in which any action is brought for payment of the annuity or judgment entered, have in certain cases an *express* jurisdiction given them by motion, to stay proceedings on the judgment or action, and to order the security to be cancelled, and the judgment, if any has been entered up, to be vacated. And in other cases, not specially provided for by the above clause, when a warrant of attorney has been given to confess a judgment, or judgment has been entered

up,

up, for securing the payment of an annuity, the court, in virtue of their *general* jurisdiction, will enter into the validity of the warrant of attorney or judgment upon motion; and, if the provisions of the act have not been complied with, will vacate the warrant of attorney, or set aside the judgment. *Ex parte Chester*, 4 Term Rep. 695. *Haynes v. Hare*, 1 H. Bl. 659.

5. The court will not upon motion make an order, which will decide the merits of the cause. 1 Bro. Ch. Rep. 366. *Pike v. Beresford*.

6. The variety of shapes in which motions are made in the court of Chancery to obtain relief, according to the peculiar circumstances of each case, renders it impossible to state every possible form in which a notice of motion may be given; the forms of notices in 2 Harr. Ch. Prac. 132. in ordinary cases may be so far descriptive of the general outlines of a notice of motion as to give an idea to the young practitioner of the form in which such notices are generally conceived. *Wyatt's Prac. Reg.* 289.

25 Vin. 497. (C) Time. At what Time a Motion may be made, for what.

1. **A**TTACHMENT cannot be moved for on the last day of term, except for non-payment of costs, or against the sheriff for not returning a writ. 1 Burr. 651.

2. Counsel may move on the last day of term to *quash* an indictment, but *not* to *quash an order*. *Ibid*.

3. The Master's report upon interrogatories of contempt cannot be moved for on the last day of term without previous leave of the court, except in extraordinary cases, and upon personal service of the notice. 1 Black. Rep. 311.

4. A motion to answer the matters of an affidavit cannot be made on the last day of term. *Jacob's case*, 4 Burr. 2502.

5. Nor any motion which would operate as a stay of proceedings, unless it appear to the court that under the circumstances it could not have been made earlier. *Leader v. Harris*, M. 37 G. 3.

6. The court will not on the last day of term hear a motion for a rule *nisi* to set aside an award. *Nettleton v. Crosby*, H. 38 G. 3. Nor can counsel be heard on that day to shew cause against such a rule, but the same must be enlarged and made peremptory for the next ensuing term. R. M. 36 G. 3.

7. A rule *nisi* for a criminal information may be granted at the end of a term against a magistrate for mal-practices during the term, but not for any misconduct before the term. *The King v. Carpenter Smith*, 7 Term Rep. 80.

(D) Quashed on Motion. What.

15 Vin. 498.

1. **T**HE court may use a discretion, either to quash an indictment on motion for insufficiency, or put the defendant to demur to it; but after verdict they are bound to arrest the judgment, if they see the charge to be insufficient. 2 Burr. 1127.

2. But the reason of not quashing on motion, but leaving the party to demur, does not hold where the objection is to the jurisdiction of the court that has undertaken to proceed. 1 Burr. 389.

3. The court will not quash an indictment on motion of the prosecutor, unless on the ground of insufficiency. *Rex v. Stratton*, 1 Dougl. 239.

4. Motion for the prosecutor to quash his own indictment is not of course, especially if the defendant has been put to expence. *Rex v. Webb*, 3 Burr. 1468.

(E) What must be done, or will be required in order to obtain what is moved for. 15 Vin. 498.

1. **A** Motion is generally accompanied with an affidavit, and sometimes preceded by a notice. The affidavit should be properly entitled, and contain a full statement of all the circumstances necessary to support the application, and the rather as it is a rule not to receive any supplemental affidavit on shewing cause. 2 Term Rep. 644.

2. Motions and affidavits for attachments on civil suits are proceedings on the civil side of the court until the attachments issue, and are to be entitled with the names of the parties. But as soon as the attachments issue, the proceedings are on the crown side, and from that time the king is to be named as the prosecutor. *Wood v. Webb*, 3 Term Rep. 253. *Rex v. Sheriff of Middlesex*, 7 Term Rep. 439.

3. Where a submission to an award is made a rule of court under the statute, there being no action, the affidavits on which to apply for an attachment for disobeying the award need not be entitled in any cause, but the affidavit in answer must. *Bevan v. Bevan*, 3 Term Rep. 601.

4. The rule to shew cause is drawn up for a particular day in term, previous to which it should be duly served. To bring a party into contempt, a copy of the rule must be personally served, and the original at the same time shewed to him; in other cases, the same degree of strictness is not required in the service of the rule, but it is sufficient, without shewing the original, to leave a copy of it with any person representing the party at his dwelling-house or place of abode. *The King v. Smithies*, 3 Term Rep. 351.

5. Before cause shewn an office copy must be taken of the rule and of the affidavit upon which it was granted, otherwise counsel

counsel cannot be heard. Previous to shewing cause, it is usual to deliver over the affidavit against the rule to the counsel for the rule, who has a right to make any objection appearing on the face of it, and if a doubt arises, upon the statement of the facts contained in the affidavit, it is inspected by the judges, or read by the officer of the court; when an affidavit has been made use of, but not before, it may be filed, in order that, if it be not true, the party may be indicted for perjury. *Tidd's Prac. K. B.*

15 Vin. 499. (G) Notice. In what Cases it must be given, and at what Time.

1. **E**VERY notice of motion must be given two days at least before the day on which it is moved; if the motion is to be on *Thursday*, the notice must at least be on *Tuesday*; if on *Monday*, the notice must be on *Friday*, *Sunday* being no day. *Maxwell v. Phillips, June 22d, 1801.*

2. Notice of motion, given by one not allowed to act as a solicitor, is not good. 3 *P. Wms.* 103. *Ex parte Sir Richard Grosvenor.*

3. Notice of motion, though seldom necessary, is frequently given in order to save time and expence, by affording the adverse party an opportunity of shewing cause in the first instance, or by inducing the court to disallow the costs of proceedings taken after the notice, and before the motion.

4. The stat. 14 *G. 2. c. 17.* requires notice of motion for judgment as in case of a nonsuit; but in the court of *K. B.* the rule to shew cause is deemed a sufficient notice. *Lofft, 65.*

5. But it is otherwise in the *Common Pleas.* *Gooch v. Pearson, 1 H. Bl. 527.*

[G]

## Murder or Manslaughter.

15 Vin. 503.

(C) By what Persons it may be.

**A** Child of ten years of age may be guilty of murder. *York's case. 1748. Foster, 70.*

(D) Of Officers, and Pleadings.

15 Vin. 504.

1. **Q**UERE. Whether a woman, who in a transport of passion, kills a peace-officer, who is about to take the man she cohabits with to prison, under a warrant which turns out to be illegal, is guilty of murder or manslaughter. *Mary Adey's case, Leach's Cr. Caf. 245.*

2. To kill a bailiff in the execution of an *attachment* issued by the *county clerk* in a cause in which *he* is plaintiff, is murder, for such attachment is legal. *Baker's case, Ibid. 131.*

3. So killing an officer, while he is endeavouring to arrest a man upon a *blank warrant*, is murder. *Ibid. 133..notis.*

4. Peace-officers, having a *legal* warrant to arrest for a breach of the peace, may break open doors, after having given due notice and demanded admittance. *Foster, 136.* But they cannot justify breaking open outward doors or windows to execute a civil suit. *Foster, 319, 320. Cowp. 3.* Therefore, where a man, who had been arrested by the artful contrivance of an officer upon civil process (that of the warrant having been filled up after it had been sealed), obliged the officer to decamp by snapping a pistol at him three times; but the officer returning to the house, accompanied by the plaintiff and the attorney, and all three attempting to force in, the man within fired a gun through the door and shot the attorney; it was ruled manslaughter only. 10 *State Trials*, 462. *Fost. 311, 312.*

5. If a stranger seeing a person arrested and restrained from his liberty, under colour of a *preps-warrant* or civil process, &c. by those who in truth have no such authority, happen to kill such trespasser in rescuing the person oppressed, he shall be adjudged guilty of manslaughter only. *Tooley's case, Lord Raym. 1296.*

But the principles

upon which this case was decided are very strongly controverted by Mr. Justice Foster, p. 315 to 318.

6. It is sufficient that the process is not defective in the frame, and that it issue in the ordinary course, though there was error in the proceedings before: and if the warrant is produced at the trial, the judgment, or decree need not. *Per Hardwicke, C. J. Roger's case. 1735.*

7. If the process is defective in the frame, if there is a mistake in the name or addition of the person on whom it is to be executed, or if his name, or the name of the officer be inserted without authority, and after issuing the process, or the officer exceeds his authority and is killed, it is only manslaughter in the person whose liberty is invaded. *Foster, 312.*

8. If a gaoler carry his prisoner, against his will, who he knows has never had the small-pox, but fears it, to a place where he knows a person having it is, and the prisoner catches it, and dies, it is murder. *Vide Cartle v. Bambridge, Stra. 854.*

9. If

9. If a gaoler (as warden of the *Fleet*) has a lawful deputy, whose servant by *duress* (of confining in an unwholesome room) kills his prisoner, it is not murder in the principal, though he sometimes acted as warden, and once saw the deceased in the unwholesome room. *Rex v. Huggins, Stra.* 882. *Ld. Raym.*

1574.

10. But it is murder in the servant. *Ibid.*

11. Persons having authority to arrest or imprison, using the proper means for that purpose, and being killed in the struggle, it is murder in all who take part in such resistance. And this will hold in all cases, whether civil or criminal. *Foster, 270.* So in case of breach of the peace, or any misdemeanor short of felony. *Ibid.*

25 Vin. 506. (E) How. By Malice aforethought, and what shall be said such.

1. *MALICE* aforethought is, when the fact is attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit; or an action flowing from a wicked and corrupt motive, a thing done *malò animo, mala conscientia.* *Foster, C. L.* 256.

2. If *A.* and *B.* have a sudden quarrel, and blows pass, and there appears a sufficient time for the parties to have cooled, and afterwards *A.* kills *B.*, it is murder. *Rex v. Oneby, 2 Stra.* 765.

3. It is the province of the judge, from the circumstances of the case, to determine what is malice, and whether the killer had a sufficient time to cool. *Ibid.*

4. If *A.* say he will avenge himself of *B.*, or that he will have his blood, this is express malice against *B.*, and if a killing ensue it is murder. *2 Stra.* 765. *2 Ld. Raym.* 1485.

5. If *A.* and *B.* play, then wrestle, then cudgel. *A.* gives *B.* a smart stroke, *B.* grows angry, throws away his cudgel, and they fight in earnest, but are parted; *A.* goes away angry, and threatens to fetch something and stick *B.*; he changes his cloaths, returns with a sword concealed and a cudgel in his hand, draws on a discourse of the quarrel, and offers to cudgel if *B.* will keep off his hands; *A.* drops the cudgel, which *B.* takes up, and gives *A.* two blows on the shoulders; *A.* draws out the concealed sword, says, "stand off, or I'll stab you;" thrusts at, but misses him; *B.* goes back; *A.* shortens his sword, leaps towards *B.*, stabs him, and he dies. It is murder. *Mason's case.* 1756. *Foster, 132.*

6. So in the case of a sudden affray, where no felony is committed nor wound given, if a person interposing to part the combatants, giving notice to them of his friendly intention, should be killed by either of the combatants, it would be murder in the person so killing. *Foster, 270.*

7. Whenever it appears that a man killed another, it shall be intended *prima facie* that he did it maliciously, unless he can make out

out the contrary, by shewing that he did it by sudden provocation. *1 Hawk. P. C. 190.*

8. *A.* and *B.* suddenly quarrel; upon some provoking language *B.* seizes *A.* by the collar; a fight ensues; they both fall to the ground; and while struggling on the ground *B.* receives a mortal wound from a knife which *A.* held in his hand. This adjudged manslaughter only. *Snow's case, Ca. in C. Law, 180.*

9. A mother-in-law, on perceiving a fault committed by her daughter-in-law in some work she was doing, throws a child's stool at her and kills her, and then conceals her death, and hides the body. *Quare, Whether it is murder or manslaughter? Hazel's case, Ca. in C. Law, 406.*

(F) How. By Intention to do a less Mischief only. 15 Vin. 508.

i. **W**HEREVER a person, in cool blood, by way of revenge, unlawfully and deliberately beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far. *1 Hawk. P. C. 194. 2 Stra. 771.*

2. If a gaoler confine his prisoner against his will in an unwholesome room without allowing him the necessaries of a chamber pot, &c. whereby he contracts a distemper by which he dies, this is murder by duress in the party doing it. *Rex v. Huggins, 2 Stra. 882.* If the verdict be, that the principal gaoler knew the condition of the room, and that within 15 days of the death he was present, with his deputy, and "saw the deceased under the duress of the said imprisonment," sufficient facts are not found to amount to murder. *Ibid.*

(G) How. Without Intention, but in doing an unlawful Act, or an Act not warranted by Law. 15 Vin. 508.

1. **T**O render the killing murder in all those who assembled to do an unlawful act, it must appear that it was committed in prosecution of some unlawful purpose: thus, smugglers assemble to run wool, officers oppose, a smuggler fires a gun, and kills another smuggler: if it does not appear it was levelled at the officers, the other smugglers present are not guilty, for it does not appear it was in prosecution of the purpose for which they assembled. *Plummer's case, Foster, 352.*

2. Three soldiers go to rob an orchard, two get up the tree, the third stands at the gate with a drawn sword, the owner's son comes and seizes him, he stabs him: those in the tree not guilty; otherwise had they come with a general resolution against all opposers. *Per Holt, Foster, 353.*

3. If one ride among a multitude with an horse used to kicking, and death ensues, it is murder. *N. P. C. 44.*

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4. If



## Murder or Manslaughter.

4. If a man, duped, and encouraged by a concourse of people, throw a pick-pocket into a pond adjoining the road, to revenge the theft by ducking him, but without any apparent intention to take away his life, and the pick-pocket be drowned, it is manslaughter only. *Old Bailey*. 1785. 1 *Hawk. P. C.* 193.

5. The defendant came to town in a chaise, and before he got out of it, he fired his pistol, which by accident killed a woman; and *King, C. J. of C. B.* ruled it to be but manslaughter. *Rex v. Burton*, 1 *Str.* 481.

6. If *A.* carry his prisoner *B.* against his will to a house where he knows the small-pox is, and that *B.* has not had it, or detains him when he desires to be removed, and *B.* catch it and die thereby, it is murder in *A.* *Coffell v. Bambridge et Corbett*, 2 *Str.* 853.

7. Accidental homicide may be murder, if it happen in the prosecution of an illegal act. *Hodgson's case, Ca. Cr. Law*, 7.

15 Vin. 509. (I) How. By or of one interposing, where two are fighting or quarrelling.

**I**F a stranger interpose to part combatants in an affray, giving notice to them of that intention, and they assault him, and in the struggle he should chance to kill, this would be *justifiable homicide*; for it is every man's duty to interpose for the preservation of the public peace, and the prevention of mischief. *Foster*, 272.

15 Vin. 512. (N) How. By *Quarrels and Provocations*, and what shall be said such.

1. **W**HERE three *Scotch* soldiers were drinking together in a public house, and one of them struck some strangers, who were drinking in another box, with a small rattan for having used several opprobrious epithets and reviled the character of the *Scotch* nation, and an altercation ensued; and one of the strangers laid hold of the soldier who had stricken, and threw him against a settle; and when the soldier had paid the reckoning, the stranger again shoved him from the room into the passage, upon which the soldier exclaimed that "he did not mind killing an *Englishman* more than eating a morsel of crowdy," upon which the stranger, assisted by another person, violently pushed the soldier out of the house, whereupon the soldier instantly turned round, drew his sword, and stabbed the stranger to the heart: this was adjudged manslaughter. *Rex v. Taylor*, 5 *Burr.* 2793.

*Side the case of Rex v.*

*John Brown*, for the murder of *J. Maccaffer*, June 1776. Cases in *C. L.* 176. And the case of the *King v. Snow*, tried before *Willes, J.* Sum. Ass. *Northampton*, 1786. Cases in *C. L.* 180.

2. In every case of homicide upon provocation, how great soever it be, if there is a sufficient time for passion to subside, and for

for reason to interpose, such homicide will be murder. 1 *Hawk. P. C.* 194. *Foster*, 278. 296.

3. Two bailiffs, who killed a prisoner (Mr. *Luttrel*) in his own house, by giving him nine wounds with a sword, and shooting him with a pistol when he was fallen on the ground, found guilty of manslaughter only, because it appeared that he had given one of them a blow with his cane. He had a sword which was drawn and broken; but how, did not appear. He had brought the pistols into the room, and declared he would not be forced out of his lodgings. He threatened the officers. Both the officers were slightly wounded. *Rex v. Rensson and Tranter*. 1 *Str.* 499. *Fost.* 292.

4. If the captain of a ship has a preps-warrant, directing that no person but a commission-officer is to be entrusted with the execution of it, and his name to be inserted on the back of it; and he accordingly appoints his lieutenant, who stays in the ship, and the captain sends his boat with some of the crew to preps, and some leagues off they board a ship, and attempt to preps, and one of them is killed, it is manslaughter, for they did not act according to the warrant. *Broadfoot's case*, 1743. *Foster*, 154.

## (O) How. By one in a Company, where it is Murder in another. 15 Vin. 516.

1. ON an indictment for murder, if the jury find a special verdict, it is necessary, in order to affect principals in the second degree, to state. 1st, That they were actually present; or 2dly, Some acts done by them at the very time, which unavoidably shew that they were present; 3dly, That they were of the same party, on the same pursuit, and under the same engagements and expectation of mutual defence and support with the person who did the fact. *Rex v. Borthwick and others*, 1 *Dougl.* 207.

2. Persons present, aiding and abetting, are principals in the second degree, and are within the riot act and ousted of clergy. *Rex v. Boyce, & Burr*. 2073.

3. *Rex v. Hodgson and others*. This was a special verdict upon an indictment for murder, found at the sessions house in the *Old Bailey*, to the following effect.—The prisoners, together with several others, were hired by one J. S. to assist him in carrying away his household furniture, in order to avoid its being distrained for rent. They accordingly assembled for this purpose, armed with bludgeons and other offensive weapons. The landlord of the house, accompanied on his part by another set of men, came to prevent the removal of the goods, and a violent affray ensued. The constable was called in, and he produced his authority, but could not induce them to disperse. While they were fighting in the street, one of the company, to the jurors unknown, killed a boy who was standing at his father's door looking on, but totally

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unconcerned in the affray. The question was, Whether this was murder in all the company? This was submitted to the consideration of all the judges in the shape of a *reserved case*. They accordingly met, and the two chief justices were of opinion, that it was murder in all the company, because they were all engaged in an unlawful act, by proceeding in the affray after the constable had interposed, and commanded them to keep the peace, especially as the manner in which they originally assembled, viz. with offensive weapons and in a riotous manner, was contrary to law, though the purpose for which they assembled, viz. to carry away the goods, was justifiable. But the majority of the judges held that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not possibly affect the rest; for the homicide did not happen in prosecution of the illegal act, and therefore the persons, though constructively present, could not be said to be aiding and abetting the death of one who was totally unconcerned in the design for which the parties had assembled. *Cases in Cr. Law*, 7.

4. There are no principals in the second degree in privately stealing from the person. *Rex v. Innis*, *Ibid.* 8.

5. If two persons be indicted for murder, the one as a principal in the first degree, and the other as being present aiding and assisting to commit the crime, the jury may find the principal in the first degree *not guilty*, and convict the principal in the second degree.

6. Persons present aiding and assisting in shooting at another, though using no fire arms themselves, are principals, and within the penalties of the *Black Act*. *The Coalheavers' case*, *Ca. C. L.* 76.

25 Vin. 519.

## (P) Justifiable. In what Cases, and Pleadings.

1. NO doubt the forcibly attempting the commission of an unnatural crime may be resisted by the death of the aggressor.

4 *Bl. Comm.* 181.

2. If a stranger interpose to part combatants in an affray, giving notice to them of that intention, and they assault him, and in the struggle he should chance to kill, this would be *justifiable homicide*; for it is every man's duty to interpose for the preservation of the public peace, and the prevention of mischief. *Foster*, 272.

25 Vin. 520.

## (Q) Justifiable. By Officers or Persons having Warrants.

1. WHERE a sheriff, &c. attempting to make a lawful arrest in a civil action, or to retake one who has been arrested and made his escape, is resisted by the party, and unavoidably kills him in the affray, it is justifiable homicide. *Foster*, 270. 4 *Comm.* 180.

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2. And in such case the officer is not bound to give back, but may stand his ground, and attack the party. *Foll.* 292. 1 *Str.* 499.

3. But no private person of his own authority can arrest a man for a *civil* matter, as he may for *felony*, &c. Neither can the sheriff himself lawfully kill those who *barely fly* from the execution of any *civil* process. *Foster*, 271.

## (R) Excusable.

15 Vin. 520.

**I**F an officer of the impress service fire in *the usual manner*, at the *ballyards* of a boat, in order to bring her to, and kill a man, it is only manlaughter. *L. Mansfield*, 2 *Corwp.* 832.

## (W) Indictment. Good or not.

15 Vin. 522.

1. **I**N an indictment for murder it is perhaps a fatal mistake not to shew the day and place of *the stroke* as well as of *the assault*, because these offences are of different kinds, the one being only a trespass, and the other a felony, and may well be intended to have happened at different times and places, and the giving of the stroke being the principal offence, ought to be set forth with the most exact certainty.

2. If a mortal wound be given upon which the party dies at another day, the death ought to be alleged at the last day. 4 *Com. Dig.* 377.

3. An indictment for murder must state that the prisoner gave the deceased a *mortal* wound. *Lad's case*, *Cases in C. Law*, 112.

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## Mute.

[ G ]

(A) Punishment thereof by *peine fort et dure*, or 15 Vin. 527.  
*otherwise*, in what Cases by the common Law, or by Stat. *Westm.* 13 *E. c.* 12.

1. **B**Y stat. 12 *G. 3. c.* 20. it is enacted, That if any person, being arraigned on any indictment or appeal for felony or piracy, shall, upon such arraignment, stand mute, such person shall be convicted of the felony or piracy charged in the indictment, and the court shall award judgment and execution against such person in the same manner as if he had been convicted by verdict or confession, and such judgment shall have all the consequences

in every respect as if such person had been convicted by verdict or confession, and judgment thereupon awarded.

2. *Old Bailey* session 1778. *Francis Mercier*, on his arraignment for murder, stood mute. The sheriff was directed to return a jury *instantly* to inquire whether it was "through obstinacy, or the visitation of God."—The jury found that he stood mute "fraudulently, wilfully, and obstinately, and not by the providence of God."—The judge immediately passed sentence, and he was executed. *Cases in Crown Law*, 218.

I do not find it said in any book (says Serj. *Hawkins*) what shall be done to a prisoner, who obstinately standing mute to an arraignment, shall appear to be charged upon very light suspicion; but I take it for granted, that he may be severely fined and imprisoned for the contempt. 4 *Pleas of the Cr.* 234.

## *Ne exeat Regno.*

35 Vin. 437.

(B) *Necessary* and grantable, in what Cases and how.

1. UPON a motion for a *ne exeat regno*, it was said by Lord Chancellor, that this was originally confined to state affairs, and the intent of it was to prevent any person from going beyond sea, to transact any thing to the prejudice of the king or his government, but that now it was very properly used in civil cases, but that to induce the court to continue it to the hearing the plaintiff must shew that the debt is certain; but in this case there was nothing more than a demand by a wife against her husband, by virtue of a marriage agreement, in which the defendant obliged himself to secure 1700*l.* out of his estate, real and personal, to his wife, as a provision in case she survived him; but this is a contingency which may never happen. Motion denied. 1 *Atk.* 521. 1738. *Anon.*

2. On motion to prevent a defendant going out of the kingdom till he had put in his answer, the court ordered him to give security to abide by the decree which should be made upon the hearing. 2 *Atk.* 66. 1740. *Baker v. Dumaresque.*

3. No instance of a *ne exeat* being granted where it is not a mere equitable demand, except where a wife sued in the spiritual court for alimony, and the husband threatened to leave the kingdom, and to aid that court, and out of compassion to her, it was granted. 2 *Atk.* 210. 1741. *Anon.*

4. Motion for a *ne exeat regno*, against the wife of *Glass*, who was executrix of her former husband. *Glass* was already gone out of the kingdom, and it was doubted by the Lord Chancellor whether it could be granted, as she was a *feme covert*, and could give

give no security, but the motion was afterwards granted. 3 *Atk.* 409. 1746. *Ferningham v. Glasf.* *Ambl.* 62. S. C.

5. A *ne exeat regno* cannot be granted unless the plaintiff swears positively that the defendant is indebted to him in a certain sum. 3 *Atk.* 501. 1747. *Mico v. Gualtier.*

6. An affidavit to found a writ of *ne exeat regno*, must not only say, that the defendant is indebted in such a sum, but must also mention the facts on which it arises and on which it is grounded; and in this case the bill being against an administrator, the affidavit ought to state, *as to knowledge or belief*, that assets had come to his hands; because the demand arises *in auter droit*, otherwise it would be holding one to bail who could not be held to bail at law; and would detain a person here whom they had no right to detain, the demand arising *in auter droit*. 2 *Ves.* 490. 1752. *Anon.*

7. The court will not grant a *ne exeat regno* where the person lives out of the kingdom, and the transaction was on the faith of having justice done where he resided. *Ambl.* 177. 1753. *Robertson v. Wilkie.*

8. Motion for a *ne exeat regno*, the case appeared to be, that the contract was made in *Carolina*, that a bond was given, and was afterwards satisfied by a payment in paper money, at the value which it then legally bore in that state. The state of *Carolina* afterwards passed an ordinance, which made paper of that kind not a *legal tender* in transactions *not complete*. The parties being now here, the plaintiff applied for this writ, contending that he had an equity here from the nature of the payment there. Lord Chancellor refused the writ, as no equity could arise here from a transaction *legally* satisfied in the country where it arose; and said a writ of *ne exeat* never could be granted, but upon a *clear demand*. 1 *Bro. Ch. Rep.* 376. 1784. *Anon.*

9. Bill by infants against the administratrix of an intestate's estate, (who had married again, and her second husband, for distributive shares.) An application had been made for a *ne exeat regno* against the husband of the administratrix on the affidavit of the wife, that he had possessed the personal estate of the intestate, and was going abroad; but the motion was refused as the court would not receive the affidavit of the wife against the husband. 3 *Bro. Ch. Rep.* 11. 1789. *Sedgwick v. Watkins.* 1 *Ves. jun.* 49. S. C.

10. A bond had been given by the defendant to *Saunderson*, and by him assigned to plaintiff. *Saunderson* was since dead, and nobody had administered to him. Motion for a *ne exeat regno* against the defendant, on an affidavit that he was going abroad, and in order to give the plaintiff time to obtain administration to *Saunderson*; refused, because the suit without the original representative of *Saunderson* must be dismissed for want of parties. 3 *Bro. Ch. Rep.* 25. 1789. *May v. Fenwick.*

11. A writ of *ne exeat regno* must be on an equitable demand. 3 *Bro. Ch. Rep.* 218. 1791. *Atkinson v. Leonard.*

**De exeat Regno.**

12. Motion for a *ne exeat regno*, against the defendant, who was sued as administratrix. The affidavits stated threats of absconding, and of embezzling the effects of the testator; which might, according to general computation, be worth about 2000*l*. Motion refused, as no sum was positively sworn to, and there was no precise sum for which the writ could be marked; also, for that there was no precise ground stated for the suggestion that the defendant was going abroad. 3 *Bro. Ch. Rep.* 370. 1791. *Shearman v. Shearman*.

13. Bill by two residuary legatees against a surviving executor. Motion for a *ne exeat regno* against *John Higgins*, the agent of the person claiming to be representative of the deceased executor, on the ground that he had got into his possession a bond from one *Palmer* to the deceased executor for 300 and odd pounds, which was the security for the residue; and the affidavit stated, that the deceased executor paid one of the plaintiffs regularly the interest, as his share of the residue. No personal representative of the deceased executor was before the court, there being a contest as to the representation in the ecclesiastical court. The affidavit stated a declaration, that he was going abroad. The motion was refused. 3 *Bro. Ch. Rep.* 476. 1792. *Storey v. Higgins*.

14. Upon a suit in the ecclesiastical court by wife for alimony. *Quære*, whether before the decree the Chancellor will grant a *ne exeat regno* against the husband. 1 *Ves. jun.* 94. 1790. *Coglar v. Coglar*.

15. An affidavit to support a motion for a writ of *ne exeat regno* must be positive. 5 *Ves. jun.* 91. 1799. *Roddam v. Hetherington*.

16. A general affidavit of belief that the defendant means to quit the kingdom, is sufficient, without the circumstances upon which that belief is founded. 5 *Ves. jun.* 96. 1799. *Russel v. Asby*.

17. Upon an application for a *ne exeat regno* no subpoena is served; but upon personal service of the writ the party is bound to appear and put in his answer, and then he may apply to supersede the writ; but not upon affidavit. *Ibid*.

18. *Riskings*, by deed of gift in *March* 1799, gave all his property to plaintiff *Sarah Gardiner*, and to the defendant *Wm. Edwards*, in trust for himself for life, and after his decease to pay several sums to different relations, and also 400*l*. and 800*l*. to defendant. By his will executed in *May* 1799, he appointed the plaintiff and defendant his executors, and died soon afterwards. The defendant, who was a mariner, possessed himself of property belonging to the testator to the amount of 1000*l*., as the deponent believed, and after the testator's death defendant possessed himself of other property to the amount of another 1000*l*. The affidavit then suggested, that the defendant intended to go abroad; that he had declared his intention of going to *America*, without executing the trusts of the deed; having been accused of the murder of the testator; but the grand jury had thrown out the bill: plaintiff

plaintiff suggested that she was in danger from defendant, Motion refused. 5 Ves. jun. 593. 1800. *Barstow v. Kilvington*.

(C) Directed, executed, and discharged. How. 15 Vin. 538.

1. ON motion to discharge a writ of *ne exeat regno* where the person lives out of the kingdom, Lord Hardwicke Chancellor, said, it is a reason which generally prevails with me not to grant such a writ, where one of the parties corresponding or dealing lives out of the kingdom, and the transactions were on the faith of having justice in the place where the parties respectively reside: and so it has been held where one lived in *England*, and the other in one of the plantations or settlements abroad, which are governed by the same laws; but in *Gibraltar* and *Minorca* the laws are not the same as here; in the former the jurisdiction is not adapted to the determining property and accounts between merchants. In *Minorca* the *Spanish* method of justice prevails, and therefore the reason does not hold where one of the parties resides in one of those places. But I do not rely on that so much, as that there was no faith between the parties here, of having justice where they reside; for two of them lived at first at *Gibraltar*, afterwards one of them removed to *Minorca*. His Lordship therefore ordered, that upon the defendant giving security in 1000*l.* by recognizance, with two sureties, conditioned to abide and perform such decree and orders as the court should make in the cause; the writ of *ne exeat* be discharged. *Ambl.* 177. 1753. *Robertson v. Wilkie*.

2. Writ of *ne exeat regno* obtained by one inhabitant of *Antigua* against another upon a bond stated in the bill to be lost; discharged on giving security to abide by the decree. 3 Bro. Ch. Rep. 218. 1791. *Atkinson v. Leonard*.

3. Writ of *ne exeat* discharged on payment into court of the sum for which it was marked. 1 Ves. jun. 96. 1790. *Evans v. Evans*.

4. Writ of *ne exeat regno* obtained by one *French* emigrant against another, discharged upon the circumstances appearing upon the affidavits in support of the bill, and upon the answer, which may be read: the application not being in the nature of an application to hold to bail, but to the discretion of the court, applying a remedy, not in its origin distinctly applicable to private transactions between subject and subject; it is very delicate to apply it against foreigners; it would be a necessary term that it should be simply a case of equity. 4 Ves. jun. 577. 1799. *De Carriere v. De Calonne*.

5. Writ of *ne exeat regno* obtained by a resident here, against a resident in the *West Indies*, upon a demand rising there, when the answer came in, was discharged under the circumstances with costs, against *prochein amy* of the infant plaintiff, but upon the admissions in the answer the defendant was ordered to give security to



to abide the decree. 5 *Vef. jun.* 91. 1799. *Roddam v. Hatberington.*

6. When a party is taken, he must give a bond to the Master of the Rolls, in such penalty as is required by the writ for yielding obedience thereto, or satisfy the court by answer, affidavit, or otherwise, that he hath no design of leaving the kingdom, or that he is not indebted to the plaintiff in any sum of money whatever, before the writ can be discharged. *Hind. Prac. Ch.* 612.

7. The present practice is for the defendant to give security to abide the decree, before the writ is discharged, which security is taken by recognizance before the Master. *Ibid.*

[ G ]

### Negative Pregnant.

15 Vin. 543. (A) What Plea shall be said to be Negative Pregnant:

**A** Return to a *mandamus* (to certify the election of a recorder,) "that the corporation were not duly assembled to proceed to the election of a recorder," is bad, because it contains a negative pregnant. *Per Buller J.* The writ says, that the corporation being *duly assembled* proceeded to the election of a recorder, and the return is that they were not duly assembled to *proceed to the election of a recorder*. This means that they were duly assembled for some purpose, but not for the purpose of electing a recorder; but that mode of pleading cannot be supported. *Rex v. The Mayor, &c. of York*, 5 *Term Rep.* 79.

15 Vin. 550.

### Ne unques accouple.

**A** Replication to a plea of "*ne unques accouple*" in dower, alleging a marriage in *Scotland*, may conclude to the country; and in such replication it is not necessary to state that the marriage was had at any place in *England*, by way of venue. *Bderton v. Ilderton*, 2 *H. Bl.* 145.

## Night-walker.

[ G ]

15 Vin. 555.

1. BY 14 G. 3. c. 90. s. 14. watchmen are empowered to apprehend all *night-walkers*, malefactors, rogues, vagabonds, and other loose and disorderly persons disturbing the public peace, or whom they shall have cause to suspect of any evil designs, and all persons lying or loitering in any square, street, court, lane, mews, yard, alley, passage, or place.

2. If a constable take up a person in the night, as a night-walker or disorderly person, without any just ground of suspicion, and any person comes to rescue the party so detained, and kills the constable, or any that assists him, it has been held only manslaughter, be the constable in his jurisdiction or not. *Queen v. Tooley*, 2 *Ld. Raym.* 1297.

3. To make an arrest of a night-walker justifiable there ought to be probable cause of suspicion. *Ibid.*

4. A constable is guilty of a misdemeanour, if he suffer a street-walker, delivered to his custody by one of the nightly watch, to escape. *Rex v. Bootie*, 2 *Burr.* 866.

## Nil dicit.

[ G ]

15 Vin. 556.

1. IF the declaration be delivered or filed, with notice to plead within the *first* four days of term, the defendant has all the morning of the *fifth* day to plead; and judgment cannot be signed for want of plea, till the opening of the office of the afternoon of that day. *Shepherd v. Mackreth*, E. 35 G. 3. K. B.

2. But in any other part of the term, if the defendant do not plead within the four days, the plaintiff may sign judgment on the morning of the fifth day. 1 *Term Rep.* 16. 4 *Term Rep.* 195, 6. 5 *Term Rep.* 35.

3. Judgment may be signed for want of a plea, if the defendant do not rejoin. *Petrie v. Fitzroy*.

4. Judgment by *nil dicit* may likewise be signed, if the defendant pleads a plea not adapted to the nature of the action, as *nil debet* in *assumpsit*, &c. *Barnes*, 257.

5. So if the defendant after craving oyer of a deed, do not set forth the whole of it, the plaintiff may sign judgment as for want of a plea. *Slater v. Horne*, 4 *Term Rep.* 370.

6. But

**Nil dicit.**

6. But the plea of not guilty, in an action of debt on a penal statute, is not such a nullity as will warrant the plaintiff in signing judgment. 1 *Term Rep.* 462.

7. In general, when the defendant pleads an improper plea, the safest course is, not to sign judgment, but to demur, or move the court to set it aside.

8. A demurrer, as in abatement to a replication to a plea in bar, held not to be a discontinuance, though the plaintiff might have taken judgment by *nil dicit*. 2 *Ld. Raym.* 1023.

[G]  
25 Vin. 556.

**Nil habuit in Tenementis.**

1. **I**N debt for rent, on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements, because if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him. 1 *Salk.* 278. 2 *Ld. Raym.* 1154. S. C.

2. A tenant who has agreed in writing to hold premises at a certain rent may allege, that the party with whom he made the agreement never had any interest in the premises, if such party was never in possession. Otherwise he cannot. *Chettle v. Pound*, 1 *Ld. Raym.* 746.

3. If both lessee and lessor sign a lease, the former is estopped to plead *nil habuit in tenementis* to an action of debt for rent by the lessor. *Wilkins v. Wingate*, 6 *Term Rep.* 62.

4. In an action of covenant for rent on an indenture brought by the assignees of the lessor, (a bankrupt) the lessee cannot plead that the lessor *nil habuit in tenementis*. *Parker v. Manning*, 7 *Term Rep.* 537.

5. *Nil habuit in tenementis* is a bad plea to *assumpsit* for the use and occupation of lands; and in debt for rent on deed poll, it must be, plaintiff had nothing at the time of the action or at any other time. *Lewes v. Willis*, 1 *Wils.* 314.

6. It was moved to plead double, *nil debet* and *nil habuit in tenementis*. Refused. *Per cur.*—The latter may be given in evidence upon the former. *Barnes*, 333. *Sed vide Salk.* 277. *Supr. pl.* 1.

7. *Nil habuit in tenementis*, or any thing tantamount cannot be pleaded in an action of covenant. *Palmer v. Ekins*, 2 *Stra.* 817.

8. The defendant may plead *nil habuit in tenementis* to an action of covenant brought by the committee of a lunatic on a lease made by him as committee in his own name; for the committee of a lunatic cannot grant such a lease. 2 *Wils.* 130.

## Nolle prosequi.

See Judgment (G). Nonsuit (F. 2).

## Nonsuit.

[G]

(B. 2) For what.

15 Vin. 567.

1. ON all process issuing out of K. B. returnable at a day certain, if the defendant appear by his attorney and file bail of the term wherein the process is returnable, and the plaintiff do not declare before the end of the term next following, a *non pros* (a) may be signed, without entering any rule to declare, or calling for a declaration. *R. M.* 10 Geo. 2. *Reg.* 2. (b). (a) It is called a judgment of non pros.

from the words *non prosequitur*, &c. formerly used in entering it up. And this seems to be the proper appellation of the judgment in action by bill; but in actions by original, where the language of the judgment was *non prosequitur brevis vel sectam*, it is more commonly called a judgment of nonsuit. *Tidd*, K. B. 377.

2. Upon a *habeas corpus*, the plaintiff must declare, if at all, before the end of the second term after putting in bail, including the term in which it was put in. *1 Stra.* 631. *Barnes*, 90. But *vide Cro. Jac.* 620. And also *6 Term Rep.* 752. If he do not declare within that time, the defendant's attorney is not bound to accept a declaration. *R. M.* 16 Car. 2. (c). *Cowp.* 117. *1 Term Rep.* 372.

3. Upon a *recordari facias loquelam*, however, by which both parties have a day in court, if the plaintiff do not appear, the defendant may sign a judgment of *non pros*. *Davies v. James*, *1 Term Rep.* 371.

4. If the plaintiff do not reply, *sur-rejoin*, or *sur-rebut* within the time limited by the rule, or order for further time, the defendant may sign a judgment of *non pros*. *Tidd*, K. B. 625.

5. If the plaintiff, being ruled to enter the issue, do not enter it within the time allowed by the rule, a *non pros* may be signed. *R. M.* 4 Ann. (c).

6. But a judgment of *non pros* cannot be regularly signed after the issue is entered, though it be not entered within the time allowed by the rule. *Minus v. Baxter*, *1 Term Rep.* 16. But see *Thompson v. Ryall*, *4 Term Rep.* 195. *Semb. contra.*

7. If

## Nonsuit.

7. If on a writ of error the record be not certified in due time, the defendant in error may sign a *non pros* for not certifying, but no costs are allowed thereon. 2 *Term Rep.* 17.

8. If plaintiff in error neglect to allege diminution within the time allowed by the rule, the clerk of the errors, on being applied to, will sign a *non pros*. 2 *Tidd, K. B.* 1138.

9. So, if he neglect to assign errors within the time limited by the rule or order, the defendant in error may sign a *non pros*. *Ibid.* 1140.

10. The stat. 13 *Car.* 2. *f. 2. c. 2.* enabling a defendant to sign judgment of *non pros* for want of a declaration in due time, extends to all cases. *Oldham v. Burrel*, 7 *Term Rep.* 26.

11. By stat. 14 *Geo.* 2. *c. 17.* (made to remedy the delay and expence attending the trial by proviso) if plaintiff neglect to bring issue to trial according to the course of the court, the court, on motion on notice, shall give judgment as in case of a nonsuit, unless they allow further time, and defendant to have costs as in a nonsuit.

12. Allegation of facts *immaterial* but relative to the title of the party, though not necessary, yet, when introduced must be proved, otherwise the plaintiff will be *nonsuited*. *Bristow v. Wright*, 2 *Dougl.* 665. But that rule holds only in records and written contracts. *Ibid.* 669. *n.*

25 Vin. 563.

### (C) Who may be nonsuited.

1. A Plaintiff cannot be nonsuited without his consent, after he has appeared. 2 *Term Rep.* 275. *Watkins v. Towers*.

2. A nonsuit can only be at the instance of the defendant, and therefore where the cause at *nisi prius* was called on, and jury sworn, but no counsel, attornies, parties, or witnesses appeared on either side, the judge held, that the only way was to discharge the jury; for nobody has a right to demand the plaintiff but the defendant, and the defendant not demanding him, the judge could not order him to be called. 1 *Stra.* 267. See also 2 *Stra.* 1117.

3. It seems that undertaking by a rule of court to give material evidence in the county of *A.* in order to fix the *venue* there, does not imply a consent to be nonsuited if the party fail. 2 *Term Rep.* 281.

4. Where there are two or more defendants, and one suffers judgment to go by default, and the others go on to trial, the plaintiff cannot be nonsuited as to these, though he cannot prove his case, but the defendant must have a verdict. *Hannay v. Smith*, 3 *Term Rep.* 662.

5. In trespass against *several*, if any suffer judgment by default, the plaintiff need only give evidence to affect the rest; and it is matter for the jury, whether the trespass proved be the same as that confessed, but the plaintiff cannot be *nonsuited*. *Harris v. Butterley*, 2 *Cowp.* 483.

(D) At what Time (a Man) may be nonsuited. 15 Vin. 564.

**I**T has been doubted, whether the plaintiff can be *nonsuited*, after bringing money into court; but there seems to be little reason for such a doubt. When money is brought into court, unless the plaintiff will accept of it with costs, in discharge of the suit, it is considered as paid before action is brought, and struck out of the declaration, and the action proceeds for the residue of the demand, in like manner as if it had been originally commenced for that only. 3 *Term Rep.* 657. And accordingly the practice of nonsuiting the plaintiff, after money paid into court, appears to be supported by many authorities. See 2 *Stra.* 1027. 4 *Term Rep.* 10. 7 *Term Rep.* 372. 2 *H. Bl.* 374. and *Tidd, K. B.* 544. (n. a.)

(F. 2) The Difference between a Nonsuit, *Retraxit*, 15 Vin. 569.  
Nolle prosequi, Non pros, and Departure; and the Nature and Effect thereof.

1. **I**F there are several defendants, and all found guilty, plaintiff may enter *nolle prosequi* against any one; therefore, if in *trover* against a defendant executor, and other defendants not executors, there is a verdict against these, and the executor is found not guilty, judgment shall not be arrested, for plaintiff may enter *nolle prosequi* as to him. *Dale v. Eyre*, 1 *Wils.* 306.

2. The court will not allow a defendant to strike out the entry of a judgment of *nolle prosequi* entered by the plaintiff as to one of the counts of his declaration after it has been demurred to. *Miliken v. Fox*, 1 *Bos. & Pull.* 157.

3. Where two defendants, in *assumpsit*, severed in pleading, and the one pleaded a bankruptcy, which, on issue joined, was found for him, it was held, that the plaintiff might enter a *nolle prosequi* as to him, and still proceed to final judgment and execution against the other. *Noke v. Ingham*, 1 *Wils.* 89.

4. *Philpot v. Muller*, B. R. T. 23 G. 3. was an action of trespass against two, who severed in pleading, and one of them signed judgment of *non pros* and sued out execution thereon. The execution was a *ca. sa.* in trespass on the case, instead of trespass. The judgment was of E. 23 G. 3. On a rule to shew cause why the judgment and execution should not be set aside for irregularity, *Buller J.* said there was a great difference between a *nolle prosequi* (as in *Noke v. Ingham*, 1 *Wils.* 89.) and judgment of *non pros*, for that by the latter the plaintiff is out of court as to all the defendants. *Vide Dougl.* 169. (n. 56.)

5. A *nolle prosequi* is considered not to be of the nature of a *retraxit* or release, but an agreement only, not to proceed either against some of the defendants, or as to part of the suit. And in these

these cases it is held that a *nolle prosequi* may be entered against one of the defendants before judgment obtained against the other, notwithstanding some decisions to the contrary. *Gree v. Rolie*, 1 *Wils.* 90. *Noke v. Ingham*, *Ibid.* 90.

6. A *nolle prosequi* is now held to be no bar to a future action for the same cause, except in those cases indeed where from the nature of the action judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff. 3 *Term Rep.* 511.

7. It seems clear that where any action founded upon a tort, such as assault and battery, false imprisonment, trover, and the like, is brought against several defendants, though they all join in the same plea and be found jointly guilty, yet the plaintiff may, after a verdict, enter a *nolle prosequi* as to some of them, and take his judgment against the rest. 1 *Ld. Raym.* *Crün v. Lewther*, 1 *Wils.* 316. *Dale v. Eyre*.

15 Vin. 572. (H) In what Cases the Nonsuit of the Plaintiff against one shall be for others. In what Actions.

1. IN a joint action it is said the plaintiff cannot be *non prosequi* by one or more of the defendants without the others. *Powell v. White*, 1 *Dougl.* 169. And this is universally true in actions by *original*, where the plaintiff cannot proceed against the defendants severally upon a joint writ. But upon process in *trespass*, if the plaintiff declare, serve a notice of declaration, or even take out a rule for further time to declare, against one or more of several defendants, and do not proceed against the others, the latter may sign a judgment of *non pros.* *Roe v. Cock*, 2 *Term Rep.* 257.

2. Where there is a judgment by default against one defendant in a joint action the other cannot *nonsuit* the plaintiff at the trial, on issue joined by him, nor if the plaintiff neglect to proceed to trial, can he obtain judgment as in case of a nonsuit under 14 G. 2. c. 17. s. 1. *Weller v. Goyton and Walker*, 1 *Burr.* 358; *Cowp.* 485. S. P.

3. In trespass against several, if the plaintiff is nonsuited before declaration, there shall be only one nonsuit as against all the defendants; for though he may declare severally, it shall not be presumed, till he does so. 1 *Comyns*, 74. 4 *Burr.* 2418.

4. If one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him; but such defendant must have a verdict if the plaintiff fail to make out his case. *Hannay v. Smith and Williams*, 3 *Term Rep.* 662.

(L) When it shall be a Bar of other Actions and 15 Vin. 575.  
peremptory.

1. IF after nonsuit on the merits, and motion for a new trial denied, plaintiff bring a new action in another court, it will stay proceedings till costs of the nonsuit paid, for this is vexatious. *Melchart v. Halsley*, 3 Wils. 149.

2. After a nonsuit in trespass the court will stay proceedings in a second action between the same parties for the same cause, until the costs of the nonsuit are paid: notwithstanding the plaintiff be a prisoner at the time of bringing the second action, and sue *in forma pauperis*. *Welfon v. Withers*, 2 Term Rep. 511.

(P) Of Judgment. Costs. In what Cases. 15 Vin. 582.

1. EXECUTORS are not liable to costs upon a *nonsuit* or verdict, when they necessarily sue in their representative character, and cannot bring the action in their own right; as upon a *contract* entered into with the testator. 2 *Ld. Raym.* 1214. 1 *Stra.* 682. S. C. 1 *H. Bl.* 578.

2. But an executor or administrator is liable to costs upon a judgment of *non pros*. *Hawes v. Saunders*, 3 Burr. 1586. *Higgs v. Warry*, 6 Term Rep. 654.

3. Where an executor merely sues *en autre droit*, he is not liable to costs upon judgment, as in case of a nonsuit. *Booth v. Holt*, 2 *H. Bl.* 277.

4. Where a defendant removes proceedings by a *recordari facias loquelam* from a county court into one of the superior courts, and signs judgment of *non pros* in default of the plaintiff's appearing, he is entitled to costs. Where by the writ each party has a day to appear in court, and the defendant may be damnified by the plaintiff's not appearing, he may appear and demand him; and if the plaintiff do not appear, the defendant is entitled to sign judgment of *non pros*, and to have his costs. *Davies v. James*, 1 Term Rep. 372.

5. Plaintiff ought to pay the costs of one nonsuit only, where a *latitat* was awarded against four defendants, though they appeared severally by different attorneys, where the *nonsuit* was for not declaring within two terms. 1 *Comyns Rep.* 74. 4 Burr. 2418.

6. Administrator nonsuited in an action for tithes accrued in intestate's life, or in *trover*, when the conversion was in intestate's life, pays no costs; but if in his own time he does. *Barnes*, 127. 129. 132.

7. If the court orders a nonsuit, the plaintiff pays the defendant his costs. *Cameron v. Reynolds*, Cowp. 407.

8. Action against two; judgment against one by default; rule for judgment for the other as in case of a nonsuit pursuant to  
VOL. V. X 14 Geo.



14 Geo. 2. c. 17. §. 1. Yet this defendant cannot have his costs taxed as in case of a nonsuit: because *the case of a nonsuit does not here exist*; for if the plaintiff be nonsuited, he must be out of court, as against *both* defendants; whereas he has obtained judgment against *one* of them. *Weller v. Goyton and Walker*, 1 Burr. 358.

9. If a *qui tam* informer, on the stat. 21 Hen. 8. c. 13. for non-residence is nonsuited, the defendant is entitled to costs. *Wilkinson qui tam v. Allot*, 1 Cowp. 366.

10. If plaintiff enter into a consolidation rule in actions on a policy of insurance where defendant has paid money into court, and become nonsuit in one, he is *not* entitled to the costs up to the time of paying money into court in the other actions that were not tried. *Burstell v. Horner*, 7 Term Rep. 372.

11. The statute 18 Eliz. c. 5. §. 3. which gives costs to the defendant in a popular action if the plaintiff be nonsuit, extends to subsequent as well as prior statutes. *Williams qui tam Drewe, Willes' Rep.* and *The Mayor, &c. of Plymouth v. Warring*, *Ibid.* 441.

12. An avowant for a rent charge is not entitled to double costs under stat. 11 Geo. 2. c. 19. §. 22. when the plaintiff is nonsuited. *Lindon v. Collins*, *Willes' Rep.* 429.

13. If an executor declare on a trover and conversion in the testator's lifetime, and also on a trover and conversion after his death, the evidence offered being only applicable to the first count, and he be nonsuited, he is not liable to pay costs. *Cockerell v. Kynaston*, 4 Term Rep. 277.

14. If an executor sue as such for money received by the defendant since the testator's death to the plaintiff's use, and fail, he is liable to costs. *Galdthwayte v. Petre*, 5 Term Rep. 234.

15. Where an executor was sued on a policy of insurance effected by his testator for himself and two others then living, and was nonsuited, the court of C. P. held, the executor should not pay costs, though the action might have been brought by the two surviving parties alone. *Wilton v. Hamilton*, 1 Bos. & Pull. 445.

## (A) Pleadable, in what Cases or Actions.

TO a *scire facias* against a terre-tenant, upon a judgment in debt, or other personal action, the defendant cannot plead non-tenure generally, because it is contrary to the sheriff's return, who says, he has warned the defendant who is *tenant* of certain lands, &c.: but the defendant is at liberty to plead a *special non-tenure*, that is, he may say, that, before the judgment or recognizance

## Non-tenure.

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zance *T. S.* was seised in fee and demised the lands to him for a term yet to come, and traverse that on the day of suing out the writ of *scire facias*, or at any time after he was tenant as of freehold of the lands: or he may say, that he is only tenant by *elegit*, or statute, and the like; and it is said that the distinction between the plea of general and special non-tenure is now settled after long and great difficulty. *Adams v. Savage*, 2 Lord Raym. 1253. *Vide 2 Saund.* 12. (n. 19.)

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## Not Guilty.

[G]

### (A) Not Guilty. Pleadable. In what Cases.

16Vin. 1.

1. **T**O an action against an innkeeper for the negligent keeping of the goods of his guest, the defendant may plead *not guilty*; though he has matter of excuse: as, that his inn was full, &c. 5 Com. Dig. 593. *Tit. Pleader*, (Q. 2).

2. Whether *not guilty* may not be pleaded to an action of debt on a penal statute? *Quere. Coppin v. Carter*, 1 Term Rep. 462.

3. Defendant may plead *not guilty* to an action for deceit in levying a fine in C. B. of land in *ancient demesne*, whereby it becomes frank-fee, though matter of record is mixt with matter of fact. *R. Tr. 10 An. in C. B.* 5 Com. Dig. 587.

4. To *not guilty* in *assumpsit* the plaintiff demurred. *Et per curiam*, Though it would be good after a verdict, yet it is ill on demurrer, and the plaintiff had judgment. *Marsbam v. Gibbs*, 2 Stra. 1022.

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## Notice.

[G]

### (A. 2) Requisite. In what Cases in general.

16Vin. 2.

1. **N**OTICE of setting out tythes is not, by common law, necessary even to support an action on the case for not fetching them away in time; but a custom to give notice is good, and slight evidence will support such custom. *Butter v. Heathby*, 3 Burr. 1891.

2. Notice of a *refusal to accept* a bill of exchange must be given by the indorsee to the person from whom he received it. *Blessard v. Hirst*, 5 Burr. 2671.

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3. A rever-

3. A reversioner stands by and sees the lessees of tenant for life (who apprehend the lessor had power to make such lease,) lay out great sums in improvements, without giving them notice, their term shall be supported in a court of equity. *Bunb.* 53.

4. In *quare impedit* notice of refusal ought in all cases to be given to the patron. *King v. Hereford (Bishop of)* 1 *Cam. Rep.* 360. (notes.)

5. If a curate be removed by the rector for any fault, he should have notice. 1 *Cowp.* 437.

6. If partners dissolve their partnership, persons who deal with either, without notice of such dissolution, have a right against both. *Ibid.* 449.

7. Where an ejectment has been brought on the demise of an infant, which is compromised, and the tenant in possession attorns to the defendant, although the infant, on his coming of age, do not accept the rent, or do any act to confirm the tenancy, yet as the former ejectment was brought at his suit, and for his benefit, he shall not be allowed to consider the tenant as a trespassor, and bring a new ejectment without notice to quit. *Doe ex dem. Miller v. Noden*, 2 *Esp. Rep.* 530.

8. If an infant sues, the plaintiff's attorney must give notice of his guardian's place of abode. 1 *Wilf.* 246.

16 Vin. 6.

#### (A. 3) Requisite in what Cases. In *Assumpsits*.

WHERE a third person is named in the consideration of an *assumpsit*, of whom the defendant may inform himself, notice need not be given of performance. *Smith v. Goffe*, 2 *Ld. Raym.* 1127.

16 Vin. 8

#### (A. 4) Requisite. In what Cases. In Matters of Practice in superior Courts.

1. THE court will not discharge one committed by a justice for aiding in running goods, upon bail, without notice to the justice, and bringing his *habeas corpus*. *Rex v. Norton*, *Bunb.* 143.

2. Although notice has been given of a motion for judgment as in case of a nonsuit, for not proceeding to trial in due time after issue joined, on which the plaintiff enters into a peremptory undertaking to try, yet notice must also be given of the like motion for not proceeding to trial according to the undertaking. *Gooch v. Pearson*, *C. B.* 1 *H. Bl.* 527.

3. Where issue is joined early enough in a term, notice of trial must be given in the same term. *Frampton v. Payne*, *C. B.* 1 *H. Bl.* 65.

4. Although the plaintiff has undertaken peremptorily to proceed to trial at the next assizes, yet the defendant is not bound to attend and be prepared with witnesses, counsel, &c. without having had notice of trial. *Ilfield v. Weeks*, *C. B.* 1 *H. Bl.* 222.

5. When the cause has been suspended, after *issue* joined, for above a year, the defendant is entitled to a term's notice of trial. *Hayley v. Ryley*, 1 *Dougl.* 71. But not if he himself has stopped the plaintiff by an *injunction*. *Ibid.*

6. Notice must be given of the execution of a writ of *scire fieri* inquiry. *Steed v. Layner*, 2 *Ld. Raym.* 1382. 1 *Stra.* 235. *acc.*

7. Notice of motion must be given to quash a writ. 1 *Will.* 30.

8. By stat. 24 *G. 2. c. 44. f. 1.* it is enacted, That no action shall be brought against a justice of the peace for any thing done in the execution of his office until a month's notice has been given, which notice shall clearly and explicitly contain the cause of action.

9. A similar notice is required to be given to officers of the excise and customs by the 23 *G. 3. c. 70. f. 30.* and 24 *G. 3. sess. 2. c. 47. f. 35.* Upon these statutes it has been holden that the month begins the day on which the notice is served. 3 *Term Rep.* 623. And then an excise officer is entitled to notice, before an action is brought against him, for an act not warranted by his official capacity, if done *bonâ fide* in the supposed execution of his duty, such as the assaulting of an innocent person whom he suspects to be a smuggler employed in running goods. *Daniel v. Wilson*, 5 *Term Rep.* 1.

10. In cases where the cause of action does not amount to 10*l.* (stat. 5 *G. 2. c. 27. f. 4.*), or where it amounts to 10*l.* and upwards, but no affidavit is made thereof, an *English notice* must be written on the copy of the process served on the defendant of the intent and meaning of such service.

11. When the declaration is delivered, a notice to plead should be indorsed on it. But when it is filed, the notice need not be indorsed, but should be left at the last or most usual place of abode of the defendant or his attorney. 7 *Term Rep.* 26.

12. If the venue be in *London* or *Middlesex*, and the defendant live within forty computed miles from *London*, there must be in general eight days notice of inquiry, exclusive of the days it is given, which notice is also sufficient in country causes. For the stat. 14 *G. 2. c. 17. f. 4.*, which requires ten days notice of trial at the assizes does not extend to notices of inquiry. But where the venue is laid in *London* or *Middlesex*, and the defendant lives above forty computed miles from *London*, there must be fourteen days notice of inquiry. *Vide 1 Tidd's Prac.* 490.

13. Where a term's notice of trial is required, there must at the same distance of time be the like notice of inquiry.

14. Where it is deemed necessary at the trial to produce any deeds, papers, &c. in the possession of the opposite party, a notice should be given to produce them.

15. When a prisoner intends to take the benefit of the lords' act, he must give to every creditor, at whose suit he is in execution, a notice in writing purporting that he intends to petition the court, and setting forth a true copy of the schedule he intends to deliver in, which notice must be given fourteen days before the petition is presented. 32 *G. 2. c. 28. f. 13.*

15 Vin. 9.

(A.5) Requisite to avoid being, or to make a Man a  
*Tortfeasor.*

THE lord of a manor, who is also a justice of the peace, is entitled to a month's notice of an action brought against him, for taking away a gun in the house of a person unqualified to kill game, by the stat. 24 G. 2. c. 44., for it will be presumed that he acted as justice. *Briggs v. Sir F. Evelyn*, 2 H. Bl. 114.

16 Vin. 13.

## (G) Of what the Law takes notice.

1. THE court will not take judicial notice of the customs of *London*. *Baſi v. Hickford and Wiſe*, Andr. Rep. 376.
2. But the court takes notice of ſuch customs of *London* as have been certified by the Recorder. *Blaquiere v. Hawkins*, 1 Dougl. 378.
3. But will not take notice of the custom in *London* that an action ſhall lie for calling a woman a "*wabore*," becauſe it has not been certified. *Staunton v. Jones*, 1 Dougl. 378. (*in notis*).
4. But the city courts take notice of the customs of the city. *Ibid.* 381. (*notes*).
5. The court is bound to take notice of the commencement, prorogations, and ſeſſions of *parliament*. *Vide* 1 Dougl. 97. (*n.* 41). Even when the proceedings are on a private ſtatute. *Ibid.*
6. It ſhould ſeem, however, that the court will not take notice of *miſrecitals* of private ſtatutes in other reſpects, without *nul tiel record* is pleaded. *Ibid.*

[G]  
16 Vin. 11.

## Novel Assignment.

1. IN trefpaſs, where the day is made material by the plea, the plaintiff's laying another in his new aſſignment is no departure. 2 *Ld. Raym.* 1015.
2. If in an action of aſſault the day is material, and the defendant pleads *ſon aſſault*, the plaintiff muſt new aſſign the day; otherwiſe if the defendant prove *ſon aſſault* any day previous to the action, it will do. *Randle v. Webb*.
3. But as the common way for the plaintiff to have two or three counts in his declaration, ſo that the defendant is under a neceſſity of pleading the general iſſue to ſome of them (for if he juſtify two, he admits two, and conſequently, unleſs he can prove two juſtifications, muſt have a verdict againſt him), he may prove another battery without being put to make a novel aſſignment. *Bull. N. P.* 17.

4. If

4. If *A.* be in possession of part of a house, and *B.* of the other part, and an officer enter into *A.*'s part under a writ against *B.*'s goods, which are not there, *A.* may maintain an action against the officer for breaking and entering his house, and need not make any new assignment to a justification under the writ against *B.* *Fallon v. Anderson*, 1 *Peake's N. P.* 110.

5. Assault and imprisonment. Defendant justifies under a *capias ad respondendum*. Plaintiff replies, the defendant released him from the arrest and afterwards arrested him, and prays judgment, because the defendant has acknowledged the trespass; this is naught, and plaintiff ought to have made a *new assignment*. *Scott v. Dixon*, 1 *Wils.* 3.

6. Where a declaration for false imprisonment against *A.* and *B.* contained two counts, to both of which the defendants pleaded not guilty, and justified the first under mesne process, *A.* as the plaintiff in that action, and *B.* as the bailiff, and the plaintiff by a *new assignment* admitting the arrest to be lawful, replied that *B.*, with the consent of *A.*, voluntarily released him, and that they afterwards imprisoned him for the time mentioned in the first count; the plaintiff, having failed in proving the *new assignment*, by not shewing the consent of *A.*, shall not be permitted to prove the same trespass against *B.* under the other count. *Atkinson v. Matison*, 2 *Term Rep.* 172.

7. Where in trespass a grant of a way, common, &c. is pleaded, if the defendant has used the way, &c. in a different manner from what he is entitled to do under the grant, the plaintiff must *new assign*. *Senhouse v. Christian*, 1 *Term Rep.* 560.

8. Where in actions for breaking and entering the plaintiff's house or land, felling his timber, or taking away his goods, the defendant pleads a license, which the plaintiff had revoked before any of the trespasses were committed; or which was confined to some particular thing, and the defendant exceeded it; the plaintiff must state the revocation or excess in a new assignment. *Vide* 1 *Saund.* 300. *Green v. Jones*, (note 6.)

9. There are some replications which rather partake of the nature of new assignments than are properly and strictly so. As where a man abuses an authority or license which the law gives him, by which he becomes a trespasser *ab initio*; if the defendant plead such licence or authority, the plaintiff must reply the abuse. *Dye v. Leatherdale*, 3 *Wils.* 20. *Taylor v. Cole*, 3 *Term Rep.* 292. *Gundry v. Felbam*, 1 *Term Rep.* 338.

## Oath.

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16 Vin. 49. (B) The Force thereof where there is Oath against Oath.

1. **W**HERE there is a single deposition only against the oath of a defendant in his answer, and the facts denied in the answer are equally strong with those that are affirmed by the deposition, there the rule that you can have no decree upon such single evidence, against the defendant, will hold; but where, as in the present case, there are a great many concurring circumstances that strengthen and support the deposition of this witness, it does not come within the aforementioned rule. 2 *Atk.* 19. 1739. *Walton v. Hobbs.*

2. On evidence of an agreement being confessed by the defendant, it was decreed to be carried into execution, though the agreement was proved by one witness only, and positively denied by the defendant's answer. 3 *Atk.* 407. 1746. *Only v. Walker.*

C 3. Bill by the original lessees of a leasehold estate, against the assignee of the lease, for a specific performance of an undertaking stated in the bill, to indemnify the plaintiffs against all rents and covenants, to be paid or kept on the lessee's part toward the original lessor, and to execute a bond for securing such indemnity; the assignment had been by sale by auction, the conditions of sale did not stipulate the indemnity stated in the bill, and it was supported only by the evidence of *Hogard* the auctioneer, who swore such agreement was entered into by the plaintiff and defendant before the sale; the answer denied the agreement; the defendant, the original assignee, had made another assignment of the lease to a third person (not a party, before the bill brought. Lord Chancellor—"Where the defendant in express terms negatives the allegations of the bill, and the evidence is only one person affirming what has been so negatived, there the court will neither make a decree, nor send it to a trial at law. Where the court does send it to a trial at law, it orders the answer to be read in evidence, and sends it to a court of law only to find the consequences; because the court of equity has such a rule, therefore it refers it to a court of law what a court of equity ought to do, as in *Lord Milton v. Edgworth*, 6 *Bro. Par. Cas.* 580.; but the rule is subject to this modification, that if there are circumstances sufficient to turn the scale it ought to be framed upon the circumstances. I do not incline to send it to a trial. I think the plaintiff ought to have his decree." It being however suggested that Mr. *Fell* was present at

at the execution of the deed, his Lordship sent it to law. 1 Bro. Ch. Rep. 53. 1779. *Pember v. Mather*.

4. A single witness cannot prevail against a positive denial by answer, 3 Ves. jun. 170. 1796. *Lord Cranstown v. Johnston*.

(C) In what Cases the Plaintiff's Oath is necessary. 16 Vin. 49.

1. **W**HERE a man prefers his bill to have discovery only of deeds, and (having the counterpart) to have the deeds established, there he ought to annex an affidavit to his bill, that he has not the original deeds, nor any other person in trust for him, or else it is cause for demurrer; but if relief be not prayed, as well as discovery, there is no need of an affidavit. *Bunb.* 47. 1719. *Johnson v. Elleker*.

2. Where a bill prays relief as well as discovery, an affidavit must be annexed that the plaintiff has not the deed in his custody. 3 Atk. 17. 1743. *Anon. and Dormer v. Fortescue, Ibid.* 132.

Occupant.

(G) Who may be a special Occupant. 16 Vin. 79.

1. **A.** being seised of a church lease to him and his heirs during three lives, by settlement before marriage limited it to the use of himself for life, and to the first and every other son in tail male; a person may take such estate so granted in fee, determinable upon lives by way of remainder, as special occupant. 1 Atk. 524. 1737. *Norton v. Frecker*.

2. A special occupancy may be of a freehold lease. 3 Atk. 708. 1749. *Hearle v. Greenbank*.

3. Testator devises all his manors, messuages, lands, tenements, tithes, and hereditaments, and all his real estate whatsoever, except what is hereinafter mentioned and devised, to the use of all his children successively in strict settlement; and gave two of them annuities, which he charged upon a rectory held by him under a lease for lives, which he directed to be renewed, if those two children or either of them should be living at his death; and that their lives or that of the survivor should be inserted in the new lease, and the fine paid out of his personal. He gave part of his personal specially; and declared the residue to be laid out in land to be settled to the same uses as his real; but afterwards, by a testamentary paper unattested, he disposed of his personal otherwise: the heir contracted to sell the lease of the rectory; and upon a case directed to the court of king's bench, on his bill



bill for a specific performance, the certificate was that the lease did not pass by the will, but devolved on the heir as special occupant; but the chancellor thought it too doubtful a title to be forced on a purchaser. 2 *Ves. jun.* 526. 1795. *Sheffield v. Lord Mulgrave*.

## Oath.

16 Vin. 255.

(A) Allowed. In what Cases.

**W**HERE at law a person is allowed sums under 40s. on his oath, he must swear positively, and not to his belief only; so under a decree that the person upon an account should be allowed such sums as he swears he has actually expended, he must peremptorily swear to the fact. 2 *Atk.* 410. 1742. *Sir John Robinson v. Cumming*.

*Vide Oath.*

[ G ]

## Obligation.

16 Vin. 64.

(P) Where the Obligations are joint or several, or both. Rules, Pleadings, &c.

1. **W**HERE the covenant is joint and several, in an action against one only, the breach may be assigned in the neglect of both. *Lilley v. Hedges*, 1 *Str.* 553.

2. If one named in an indenture do not seal, he must be excluded by an averment: or they may join in the action. *Vernon v. Jefferies*, 2 *Str.* 1146.

3. After *oyer* of the condition, and *non est factum* pleaded to a debt on bond, on which issue is joined, and notice of trial given, the plaintiff may enter a suggestion on the roll, and assign breaches pursuant to the statute, (8 & 9 *Wil.* 3. 11.) but it is irregular to deliver such second issue without a summons and judge's order. *Ethersey v. Jackson*, 8 *Term Rep.* 255.

4. To debt by an obligee of his ancestor, the heir cannot plead that he has laid out money in repairing the premises, and claim to retain on that account. 1 *Term Rep.* 454.

5. If

5. If the obligor of a bond, after notice of its having been assigned, take a release from the obligee, and plead it to an action brought by the assigner in the name of the obligor, the court will set the plea aside; and they will not, under these circumstances, allow the obligor to plead payment of the bond. *Legh v. Legh*, 1 Bqf. & Pul. 447.

6. A release by plaintiff's testator sealed, cannot be pleaded to a debt on bond. *Parsons v. Coward*, H. 10 Geo. 2. Burr. 357.

7. *Per curiam*. According to 1 Saund. 291. if the defendant in debt upon a bond would take advantage of another's being jointly bound, he must plead it in abatement, and cannot demur upon *oyer*; for if he does, the court will presume the other did not seal it. There was a demurrer here, and the plaintiff had judgment. *Gilbert v. Bath*, 1 Stra. 503.

8. So in case of a joint promissory note the defendant can only plead in abatement. *Rex v. Abbott*, Cowp. 832. *Vide* 5 Burr. 2611. Bull. N. P. p. 129.

9. If three be bound jointly and severally in a bond, the obligee cannot sue two of them only, but he must either sue them all, or each of them separately. *Per Buller J. Streatfield v. Halliday*, 3 Term Rep. 782.

10. A. gave B. a bond to secure an annuity, and before any payment became due A. lent B. a sum of money; on which it was agreed that B. should retain the payments of the annuity, as they became due, till that sum was discharged; then B. became bankrupt; and the agreement to retain was held a good plea to an action on the bond by B.'s assignees for the payments accruing after the bankruptcy, being equivalent to a plea of *solvit ad diem*. 3 Term Rep. 599.

11. In debt on bond from defendant's testator and A. jointly and severally, if defendant pleads, that testator, in his lifetime, and A. paid off the bond, and plaintiff replies, they did not pay it *modo et forma*, &c., and it appears that testator paid part in his life, and A. the rest after his death, this does not maintain the plea. *Hudson v. Stalwood*, Burr. 133.

12. If the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. *Dean v. Newball*, 8 Term Rep. 168. *Vide* *Lacy v. Kynaston*, 1 Lord Raym. 690.

13. To debt on bond to save harmless from expences by reason of naming one to a curacy, or from suits by reason thereof, if the defendant plead *non damnificatus*, the plaintiff may reply and assign for breach, that he was obliged to pay such a sum by reason of such nomination, without saying how he was obliged. 2 Wilf. 11.

14. A bond conditioned for payment of money on the 25th of December; a subsequent deed between the same parties, by which the obligee covenanted, that if the obligor should pay, on the 25th of December, 5s. in the pound, &c., such payment should be accepted in full discharge and satisfaction of all sums due, &c., and

and might be pleaded and given in evidence, &c. : the obligor (to an action on the bond) pleaded a tender and refusal of the 5s. in the pound on the 25th of December, and holden good. *Trevett v. Angus*, *Willes' Rep.* 107.

15. If the obligee in a joint and several bond make one of two obligors his executor, with others, the action on the bond is discharged as to both obligors. *Cheetam v. Ward*, 1 *Bos. & Pul.* 630.

16. But where *A.* as surety and *B.* as principal are jointly and severally bound to *C.*, *B.* becomes insolvent, and *C.*, the obligee, receives a dividend from his effects, and covenants not to sue *B.*, and that if he do so, the deed of covenant may be pleaded in bar, *C.* may nevertheless sue *A.*, for this is only a release to *B.* by construction. *Dean v. Newball*, 8 *Term. Rep.* 168.

17. A contract made by two partners to pay a certain sum of money to a third person *equally* out of their own private cash is a joint contract, and they must be sued jointly upon it. *Byers v. Dobey*, 1 *H. Bl.* 236.

18. Upon a joint bond, the action cannot be brought against one of the obligors only. This was the point in the case of *Horner v. Moor*. *Non est factum* was pleaded, and the jury found it the deed of both. Mr. Serjt. *Hewitt* moved in arrest of judgment, upon the face of the declaration. He acknowledged that it could not be moved in arrest of judgment, if it had not appeared upon the face of the declaration, but it there appeared that both had sealed the obligation, and that both were living. He owned, that if it had not appeared upon the face of the declaration, it must have been averred. The counsel for the plaintiff gave it up, and the judgment was arrested. *Vide 5 Burr.* 2614.

[G]

## Office or Inquisition.

16 Vin. 87.

(G. 2) Traversed. In what Cases, and how.

1. IF on a commission to inquire whether *A.* is an alien it is found against the king, he cannot have another new commission in the same county, but he may a *melius inquirendum*; and if that also is found against the king, it is conclusive; if for him, *A.* may traverse. *Ex parte Dupleffs*, 2 *Ves.* 438.

2. The person against whom a commission of lunacy issued, on the different appearance made upon the second inspection, was allowed to traverse the inquisition, and the grant of the custody suspended till further order. *Ex parte Roberts*, 3 *Atk.* 6.

3. After

3. After *B.* had been found a lunatic under two inquisitions, the court would not allow him to traverse the second. *Ex parte Barnsley*, 3 *Atk.* 184.

4. Where an inquisition finds a person an idiot, the court thinking it hard, would not grant the custody, without giving leave to traverse the inquisition. *Ibid.*

5. Not only the lunatic, but the heir of the lunatic, is bound upon the traverse of the inquisition. *Ex parte Roberts*, 3 *Atk.* 308. *Vide ex parte Grimstone*, *Amb.* 706.

6. Where the alienee and the lunatic traverse, if he is found a lunatic at the time of alienation, the alienee is bound. 3 *Atk.* 312.

7. The traversor of an inquisition of lunacy found for the king, shall be considered as a defendant, and therefore the record shall be made up and carried down to trial by the prosecutor. *Rex v. Roberts*, 2 *Stra.* 1208.

8. When an inquisition is traversed, security is taken to the value of two years' profits of the lands. *Rex v. Barlow*, in *St. Tr.* 1718. *Bunb.* 25.

## (H. 2) Proceedings.

16 Vin. 95.

1. NOTICE of issuing a commission for an inquest of office, to inquire whether lands are not escheated, shall not always be given; but on circumstances the court will grant it. *Rex v. Daly*, *Tr.* 1749, in *Scac.* 1 *Vesf.* 269.

2. Where there is any misbehaviour in the execution of an inquisition of lunacy, the court, upon examining into it, may, if they see cause, quash it, and direct a new commission. *Ex parte Roberts*, 3 *Atk.* 6.

## (Q) Pleadings.

16 Vin. 100.

1. TO an inquisition on an extent on an outlawry, the defendant, as terre-tenant, may plead that the party outlawed is dead, without setting forth special title. *Rex v. Barnfield*, *H.* 1721. *Bunb. Rep.* 102.

2. A writ of *diem clausit extremum* shall not be set aside on motion, for defendant may plead to the inquisition. *Rex v. Michener*, *Bunb.* 118.

3. If a term of years is found and sold on an inquisition on an outlawry, a mortgagee not in possession shall be allowed to plead to the inquisition. *Rex v. Blunt*, *Bunb.* 104. *Semb.*

4. On an outlawry, inquisition returned thereon, *levari* issued, and money levied, he who has a statute-merchant, and is in possession of the land, may, on motion, have time to plead to the outlawry and inquisition; and, on giving security, have the money in the sheriff's hand repaid him. *Rex v. Tollet*, *Bunb.* 123.

5. If

## Office or Inquisition.

5. If on inquisition a man is found possessed of a term in right of his wife, and after his death it is sold on *venditioni exponas*, the widow shall be permitted to plead to the inquisition, though she has defended an ejectment brought by the purchaser, and filed a bill in Chancery. *Watts v. Robinson, Bunb. 220.*

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[G]

## Other Action pending.

26 Vin. 148.

(F) Pleadings. How the Pleadings must be.

IT is said, in one case, that the pendency of a prior action for the same cause may be pleaded *in bar* to the second action; but cannot be pleaded in abatement. *Say. Rep. 216.* This, however, must be understood with reference to the particular case of a *quittam* action, and not as a general rule applicable to all cases. *Tidd. K. B. 560.*

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[A]

## Officers and Offices.

16 Vin. 121.

(N &amp; O) Forfeiture. By what Act or Thing.

A Mandamus was moved for to restore Serjeant *Burland* to the office of Recorder of *Wells*, from which he had been removed. It appeared that two grounds of forfeiture were charged against him: First, that he had refused to administer the oath to the returning officer at an election there, and had administered it to another person, and assisted to hold the election contrary to the adjournment of the returning officer. But as it appeared clearly that he had acted from mistake and not from corrupt motives, the court held this to be no cause of forfeiture. The other ground was, his having once neglected to attend his duty at sessions. But it appearing that he had no particular notice to attend; and that no particular business was expected or did come on, and that the sessions might be held without him; the court held this not to be such *crassa negligentia* as should forfeit the office. *Rex v. The Corporation of Wells.*

(O. 4) Discharged or determined. In what Cases, 16 Vin. 130.  
and the Effect thereof.

1. **O**N a mandamus to restore a recorder, they returned that he was only an officer at pleasure, and that another had been chosen, & *per inde* the former removed; and it was held good. *Rex v. Mayor of Canterbury.*

2. If a minister be suspended, during the suspension the place is full; for it only is an impediment to the enjoying any benefit from the office, and if his consent be necessary to any particular thing, he is as much empowered to consent as ever he was. *Philips v. Bury*, 2 Term Rep. 351.

(L. 2) Deputy. What he may claim as such. 16 Vin. 134.

**T**HE plaintiff, prothonotary of the palace court, appointed the defendant his deputy; and it was agreed that the defendant should have certain fees, and should account for the rest. New fees, arising from a change in the practice of the court, shall go to the principal, and not to the deputy who has stipulated for a certain portion. *Bulstrode v. Gilburn*, 2 Stra. 1027.

## Overseers.

[A]

For what Place to be appointed.

16 Vin. 414.

1. **A**N appointment of two substantial householders in the precinct of the *Tower within, otherwise called the parish of St. Peter ad vincula*, to be overseers of the poor of the *said precinct*, is bad; for it is not an appointment for a parish under 43 Eliz., nor for a township or village under 13 & 14 Car. 2. A precinct may be more or less than a parish, and the *alias dict.* don't help it, for the words going before it are presumed to be the true name. *Rex v. Leven and Arnold*, Sayer 278. 3 Burn's Just. 308.

2. An extra-parochial place, consisting of *two houses* and 300 acres of land, is not a township or village within 13 & 14 Car. 2. *Rex v. Denham*, Burr. S. C. 35. 2 Stra. 1004. 2 Seff. Ca. No. 171. and *Cases in B. R.* 7, 8, 9 & 10 G. 2. c. 163.

3. An extra-parochial place, once consisting of a capital messuage and three keepers' lodges in the park now disparked, and consisting of five dwelling houses and farms occupied by five tenants,

## Overseers.

tenants, but never having had overseers appointed, is not a township or village within the statute. *Rex v. The Manor of Grafton, Burr. S. C. 101. 2 Stra. 1071.*

4. It is a good return to a mandamus, directing the appointment of overseers, that the extraparochial place is not a village, and is not, nor ever was reputed to be a village or township. *Rex v. Welbeck, 2 Stra. 1143. 2 Bott by Const, 24 Pl. 43.*

5. An order was quashed which appointed overseers to a place consisting of a capital messuage, two ancient and a newly erected cottages, all occupied by the under-tenants of S., who resided in the capital messuage; for, *per Lord Mansfield, C. J.* by these means a place may be made into a village which is not so, and the inhabitants, by contrivance, withdraw themselves from maintaining the poor of the parish. *Rex v. Showler and Atter, 3 Burr. 1391.*

6. The sites and areas of ancient cathedrals, colleges, and inns of court, are extra-parochial, and for such places, either legally or by reputation, overseers cannot be appointed. *Rex v. The Justices of Peterborough, Cald. 238.*

7. To obtain a mandamus for the appointment of overseers, it must expressly be sworn that the place in question is or is not reputed to be a vill. *Rex v. Justices of Bedfordshire, Cald. 167.*

8. Where the sessions had adjudged as a fact that *Renton-Abbey* was a vill by reputation, upon the evidence stated in the case, the court are precluded from going into that question. *Rex v. Renton-Abbey, 2 Term Rep. 207.*

## For a Township under 13 &amp; 14 Car. 2. c. 12. s. 21.

1. **O**N shewing cause to a rule why a mandamus should not issue to compel the justices to appoint overseers for the township of *Kentish Town*, it appeared by the affidavits, that this parish has always had two overseers; that one rate was made for the whole parish, which each overseer collected and paid within his own division, they accounting with each other for the surplus and dividing it equally. *Per Cur.* This has never been considered as a separate parish; what is declared in the affidavits shews that they can do very well under 43 Eliz. To bring this within 13 & 14 Car. 2. they must shew this to be a distinct vill or township. We expected they would have shewn that they had separate overseers, maintained their own poor separately, and had a separate rate. Rule discharged. *Rex v. Justices of Middlesex, 1 Bott, by Const, 35. Pl. 49.*

2. A parish, 20 miles in length and 8 in breadth, had four overseers, who were made by one joint appointment, one being nominated out of each district, till 9 G. 1. It had also one rate by which the poor of the whole parish were relieved, and four church-wardens. The quarter sessions in the 9 G. 1. ordered that the several townships within the parish should maintain their poor separately, which was acquiesced in above 40 years. *Per Lord Mansfield.*

*Mansfield.* The policy of 13 & 14 Car. 2. is mistaken. The divisions ought rather to be enlarged than diminished; it ought to appear that there was an inability in the parish to have the benefit of 43 Eliz. Quite the contrary appears here for a great number of years. Their acquiescence under the division was upon a false notion that the sessions had the power to make it, which they had not. They ought to appoint overseers for the whole parish: *Peart v. Westgarth*, 3 Burr. 1610.

3. So where a parish, consisting of five townships, had separate appointments of overseers, and a joint maintenance of its poor until 1730, since when they have generally maintained them separately; and it was not stated as a substantive fact that the parish had not had the benefit of 43 Eliz. *Per Cur.* it must appear that there was a disability to reap the benefit of 43 Eliz. Here the contrary appears, for there was a joint maintenance, and acquiescence for a number of years won't alter the law. *Rex v. Uttoxeter*, Dougl. 332. Cald. 84. *Rex v. Beeding*, otherwise *Seal*, S. P.

4. A parish consisted of eight townships, each of which had been immemorially, a separate constable and churchwarden, two of them from time immemorial, and a third for 70 years have had separate overseers. For the remainder there was a joint appointment of overseers and a general rate, one overseer being chosen out of and acting for each township. But at the end of the year there was a general settlement of all disbursements, and the expences borne equally by all. On a motion for a mandamus to appoint overseers for one of the remaining five, the court resolved. 1. That where there was a constable there was a township. 2. That this township could not reap the benefit of 43 Eliz. For that act means that all the divisions of the parish should join in maintaining their poor as a parish. But here three townships have separate overseers. Besides, the remaining townships have five overseers, which affords a strong argument to prove that if even they were comprehended in a parish distinct from the other three they could not enjoy the benefit of 43 Eliz., which allows only four overseers. *Rex v. Sir Watts Horton et al.* 1 Term Rep. 374. *Vide* also *Rex v. The Inhabitants of Leigh*, 3 Term Rep. 746.

5. The parish of *Kirkby-Stephen* consisted of 10 townships, one of which had the same name, and all maintain their respective poor and have separate overseers. A pauper was removed by an order directed to the officers of the PARISH OF K. S., and adjudging him settled in that parish, and delivered with the pauper to the overseer of the TOWNSHIP OF K. S. who did not appeal. About a year after, this township removed the pauper to another township in the same parish where he had previously been settled. *Sed per Cur.* The original order to the parish of K. S. must mean the township of K. S.; the poor not being maintained by the whole parish, but by the particular townships. The township of K. S. could not have got rid of the order but by appealing against it, and they are concluded by not having done so. *Rex v. Kirkby Stephen*, Burr. S. C. 664.



### By whom, and in what Numbers to be appointed.

1. **T**WO justices appointed a single overseer. The court held the appointment good, for it don't appear but that another may have been appointed by another order. *Rex v. Besland*, 1 *Bott* by *Const.* 15 pl. 30. 1 *Wils.* 128. *Rex v. Morris*, 4 *Term Rep.* 550. *Nol. Rep.* 31. S. P.

2. An appointment of five overseers is bad, and the statute requires the appointment of either four, three, or two. *Rex v. Loxdale*, *Burr.* 415. *Vide also Rex v. Harman*, 1 *Bott* by *Const.* 13. pl. 29. and *Rex v. Morris*, 4 *Term Rep.* 550. *Nol. Rep.* 31.

3. The sessions have no original jurisdiction to appoint overseers. *Flag v. Chalmerton*, fol. 8.

4. But they have upon appeal the same latitude of discretion in judging who are fit to be nominated overseers as the two justices had. If they assign no reason, their order is good, for the court will presume that they acted on proper grounds. *Rex v. James Gayer*, *Esq.* 1 *Burr.* 245.

5. An appointment of overseers by two justices, if signed separately, is bad; for it is a judicial act wherein the justices are to exercise their discretion. *Rex v. Forrest et al.* 3 *Term Rep.* 38.

6. The parishioners may appeal to the sessions under 43 of *Eliz.* against an appointment of overseers, as well as the persons so appointed. *Ibid.*

### Who may be appointed, and how styled in the Order.

1. **A**PPPOINTMENT quashed, which described the persons appointed as principal inhabitants and not substantial householders. *Rex v. Weobly*, 2 *Stra.* 1216. *Rex v. Morral*, *Bott*, pl. 3. S. P. and *Rex v. Great Marlow*, *lb.* pl. 2. and *Rex v. Sherringbrook*, *Lord Raym.* 1394. *Sed vid. Rex v. Morris*, 4 *Term Rep.* 550. *Nol. Rep.* 31. *Vide cont.*

2. An order quashed because it only called them substantial householders, without adding these, or in the parish. *Ib.*

3. A woman may be appointed an overseer of the poor. *Rex v. Alice Stubbs*, 3 *Term Rep.* 395.

4. Householders, although labourers and poor, may be appointed overseers, where there are no other persons to serve who are more opulent. *Ib.*

5. Where a district contains only three houses, the inhabitants of all three may be appointed overseers. *Ib.*

6. *Quare*, whether one who is a justice of peace and lieutenant of marines can be appointed overseer. *Rex v. James Gayer*, *Esq.* 1 *Burr.* 245.

7. By

7. By 2 G. 3. c. 30. no person, serving for himself as a private man in the militia, shall, during the time of such service, be liable to serve as overseer of the poor.

8. By 18 G. 2. c. 15. freemen of the corporation of surgeons in London are exempted from the office of overseer of the poor.

### At and for what Time.

1. IN *Rex v. Butler* Lord Mansfield doubted whether an appointment of overseers on Sunday was not clandestine and void. *Blackst. Rep.* 649. *Sed vid. Rex v. Clerkenwell, Foley*, 4. *contra*.

2. Two adverse sets of borough justices met before the midnight of *Easter Eve*, and each began making appointments of overseers the instant the clock had struck twelve, and one set made a fresh appointment at eight next morning. Lord Mansfield said he knew of no authority which says that an appointment made on Sunday is good; that this was a shameful prostitution of office to election purposes; and *per Cur.* let all the appointments be set aside, and a mandamus be directed to the justices to make a new one. The mayor to give two days' notice of the time and place of meeting. *Rex v. The Overseers of Bridgewater, Cowp.* 139. *Sed vid. Rex v. Merchant and Allen, Justices of Bridgewater, East.* 9 G. 3. 1 *Bott by Const.* 21. *pl.* 37.

3. The appointment of overseers, although made more than a month after *Easter*, is not void, for it would subject the parish to great inconveniences. The statute is only directory, and inflicts a penalty of 5*l.* for not following such directions. *Rex v. Sparrow*, 2 *Seff. Ca.* 140. *Stra.* 1123. 1 *Bott by Const.* 17. *pl.* 35.

4. Appointment of overseers for a whole year is good, although *Easter*, when new ones are to be appointed, being a moveable feast, the time of their service may either exceed or fall short of that in which others should be chosen. *Rex v. Jones, Bott*, *pl.* 16. *Rex v. Great Marlow*, *fol.* 5.

5. An order was made on *Easter Wednesday* 1766, appointing the defendants overseers of the poor for this present year 1766. This is a good appointment for a year; for, by the court, it manifestly means the overseers' year; and where this construction may be taken two ways, it should be taken in that sense which makes the order good. *Rex v. Helling et al.* 3 *Burr.* 1905.

6. Objection to an appointment by which the defendants were on the 6th of October appointed overseers for the year next ensuing the date thereof, but overruled on the authority of *Rex v. Sparrow*, as it might be taken to mean only the overseers' year. *Rex v. Alice Stubbs*, 2 *Term Rep.* 395. *Vid. also Rex v. J. Burder*, 4 *Term Rep.* 778. *Nol. Rep.* 111.

## Overseers' Accounts.

1. **M**ANDAMUS to the justices to grant a warrant for levying the balance of the last overseers' accounts still in their hands. Return that the vestry had ordered the overseers to retain that balance and employ an attorney to sue for some charity money, and that the balance was exhausted in fees, and the overseers had engaged to pay the attorney, and therefore they had refused the warrant. *Per Cur.* There must go a peremptory *mandamus*, for the statute says the balance shall be paid over to the new overseers, under a penalty, and it is not in the power of the vestry to dispense with the statute. *Rex v. Justices of Somersetshire, Stra.* 992.

2. The defendant had received, as overseer of the poor, 4*l.* previous to his becoming a bankrupt, which was on the 5th *December* 1785; his accounts were not made out till the *Easter* following, and he had been committed by two justices for not paying over the 4*l.* as the balance. It was moved for an *habeas corpus* that he might be discharged, on the ground that it appeared from his accounts that the debt existed previous to the bankruptcy, and might have been proved under the commission, and the defendant had since obtained his certificate. *Per Cur.* This motion can only be sustained on the ground that the parishioners had a cause of action against the defendant before the bankruptcy, but the parish could not have sued, nor had they a right to call for the money till a fortnight after *Easter* 1786. Even if the sum had been kept by itself, the bankrupt's assignees could not have touched it. Rule discharged. *Rex v. Egginton, 1 Term Rep.* 369.

3. A *mandamus* was moved for to the justices to swear a late overseer to his accounts, upon an affidavit made by himself that he was ready to swear to the truth thereof. It was objected that the account consisted of gross sums, and that he had refused to answer some questions touching the particulars. *Per Cur.* A *mandamus* is of course. If the justices have any legal objection, they may return it upon the *mandamus*. *Rex v. The Justices of Middlesex, 1 Wils.* 125.

4. A *mandamus* will lie against the old overseers to compel them to deliver their books and papers to their successors. *Rex v. Bletsoe, Mich. 7 G. 2. 1 Bott by Const,* 260. *pl.* 276.

5. Justices may fine overseers as well as imprison them for refusing to account. *Rex v. Sedgewold, 1 Bott by Const,* 260. *pl.* 277.

6. A *mandamus* was granted to oblige the old overseer to deliver over the books of the poor rates to the new one; for, by the court, they are public books, and the churchwardens and overseers for the time being ought to have the custody of them, that the parishioners may have access to them. *Rex v. Clapham, 1 Wils.* 305.

7. An appeal against an overseer's accounts is given generally by 43 *Eliz.* to any ensuing sessions at any distance of time, and this

this is not repealed by 17 G. 2. But if the appeal is not made to the next sessions the court cannot award costs. 3 *Burn's Just.* 677. *Rex v. Justices of Berkshire*, 1 *Bott by Const.* 266. pl. 292. *Rex v. Bowen*, 1 *Bott by Const.* 263. pl. 290.

8. The inhabitants may appeal against a rate assessed for the purpose of reimbursing overseers for the expence of law proceedings, and they need not wait to appeal against the overseers' accounts, for they are aggrieved so soon as the money is improperly assessed upon them. *Rex v. Micklefield*, Hil. 25 G. 3. 1 *Bott by Const.* 269. pl. 293.

9. On appeal against an allowance of the account by two justices, the sessions ordered the overseer to pay so much over, which they adjudged to be in his hands, and, for not doing it, committed him. *Sed per Cur.* They should have levied the arrears by distress and sale, and, in default of distress, committed him, for they must execute their judgment in the same manner with the two justices. *Rex v. Hedges*, 3 *Salk.* 535.

10. Motion to quash an order of sessions relating to accounts of overseers, because it did not appear that they had been before two justices *quorum unus*. It was urged against this that it appeared that there was an allowance, for the appeal is said to be *against the disbursements and the allowance thereof*. *Sed per Cur.* It don't follow that it was an allowance by two justices, for the parish might do it. The order must be quashed for want of jurisdiction. *Rex v. Bartlet*, *Stra.* 983.

11. Original order was made at sessions on an appeal of the present overseers, directing their predecessors to pay them the balance of their accounts. The court were of opinion that it must be quashed, for the sessions had no right to make such an order in the first instance, without a previous application being made to two justices, pursuant to 43 *Eliz. c. 2. s. 4 & 6*. and that 17 G. 2. made no alteration in this respect. *Rex v. Whitear et al.* 3 *Burr.* 1365.

12. On an appeal against the allowance of an overseer's accounts, the sessions disallows several items, but their order don't proceed to direct him to pay the amount of them to his successor. Two justices out of sessions may enforce payment; for the effect of the appeal was to ascertain the *quantum* of the arrears, and then the statute attaches and enables the magistrates out of sessions to enforce payment of the balance. If the justices refuse, the court will grant a mandamus to compel them to hear the complaint. *Rex v. Sir John Carter et al.* 4 *Term Rep.* 246.

13. *F. T.*, having advanced money to the relief of the poor when churchwarden, informed the inhabitants at their meeting that he was considerable in disburse, and prayed a rate to reimburse him. This was refused on the ground that the late parish officers had sufficient in their hands, upon the balance of their accounts, to reimburse him; and they agreed that it should be applied to the purpose. This balance was received by the present churchwardens and overseers. The sessions made an order upon them

to pay *F. T.* the sum due to him, which was affirmed in *B. R. Rex v. Limehouse, Bott, pl. 100.*

14. An order was made at the quarter sessions upon the present overseers, directing them to pay to the late ones certain sums due upon their accounts, and another sum paid by one of them to an attorney for business by him done for the parish, but was quashed by the court of *K. B.* for insufficiency. *Rex v. St. Peter's the Great, Chichester, fol. 33.*

15. Overseers cannot take credit for money paid as a salary to an assistant overseer, although such assistant be appointed with such salary at a vestry meeting. *Rex v. Welch et al. Hil. 25 G. 3. 1 Bott by Const, 277. pl. 304.*

### Disobedience of Persons made Overseers, how punished.

1. **R**EFUSING to take upon one the office of overseer is an indictable offence, and the penalty appointed by the statute is only for neglect of duty in the office. *Rex v. Jones, 2 Sess. Ca. 187. Stra. 1146. 1 Bott by Const, 298. pl. 347.*

2. The parishioners, as well as overseers who are appointed, may appeal to the sessions against such appointment, under 43 *Eliz. c. 2. s. 6.* *Rex v. Forrest, 3 Term Rep. 38.*

3. A pauper was kept with her two bastards in the poor house more than a year, and then allowed one shilling a week towards the maintenance of herself and children. Afterwards the officers refused to continue the payment, but offered to take her and her children into the poor house. The sessions made an order on the officers to allow her a shilling *per week* towards her maintenance and that of her children. The officers were indicted for refusing to obey; and a case being reserved for the opinion of the judges, they determined that upon the words of 9 *G. 2. c. 7. s. 4.* and under the circumstances of the case, the defendants were empowered by law to refuse payment. *Rex v. Carlisle, cited and holden to be authentic per Lord Mansfield C. J. in Rex v. Winslip and Greenwell, Cald. 72.*

4. The court granted an information against an overseer for removing a poor woman very sick and near her time into another parish, to avoid the expence which might be incurred by her delivery in his own. *Rex v. Busby, 1 Bott by Const, 296. pl. 344. Vide also Rex v. Tarrant, lb. 301. pl. 351. 4 Burr. 2106.*

5. So also for conspiring to marry a pauper. *Rex v. Herbert, Stra. 757.*

6. The court refused to quash an indictment against overseers for not paying over money to their successors. *Rex v. King, Stra. 1208. Vide also Rex v. Purdy et al. 1 Bott by Const, 300. pl. 350.*

7. Motion to quash an order of seizure for neglects with respect to the office of overseer. The order of seizure sets forth *that the defendant*

*defendant was guilty of eleven neglects of the office, and therefore orders 11l. to be levied pursuant to the act.* The court were of opinion that this was an order from the words of adjudication in it, and not a mere warrant of distress, and therefore the court will take notice of it. It was insisted in support of the rule, that it did not appear that the defendant had notice of the order of appointment before the order of seizure was made; that five of the neglects were for absence from monthly meetings, four for absence from other meetings, one that his maid refused to take the rate book, and the last because he refused to take half a year's parish rate tendered to him. The court being of opinion that some of the acts punished as neglects (among which were the refusal by his maid of the rate book and his refusal of the rate) not being such, and the whole being comprehended in one judgment, and a gross sum directed to be levied, quashed the order; and *per Probyn J.* here are 11 penalties for 11 distinct neglects of quite different natures, and they ought to be distinctly levied for each offence. *Rex v. Harman, 1 Bott by Const, 297. pl. 346.*

### Protection in their Office.

1. **TRESPASS** against the overseers of the poor for taking a gelding. Justification, that by virtue of their office, and in pursuance of a justice's order, they levied satisfaction for a poor rate, which was the trespass complained of. It was objected at the trial, that by 24 G. 2. c. 44. a demand should have been made of the perusal and copy of the justice's warrant and six days' neglect and refusal. On a motion for a new trial, the court of K. B. were of opinion that all officers acting under a justice's warrant are within the benefit of that statute. *Jackson's case, Lofft, 249. S. C. Clayt. 45.*

2. In an action of trespass against an overseer of the poor, on account of something done by virtue of the 43 Eliz. c. 2. a verdict was found for the defendant; but the jury omitted to assess the treble damages given by that statute. *Denison J.* If judgment had been entered up, the award of a writ of inquiry would have been too late, but as it has not, the court may award one. But a suggestion must be entered on the *postea*, that the defendant was an overseer of the poor, and that the action was brought against him for a thing done by virtue of 43 Eliz. *Bennet v. Hart, Sayer's Rep. 214. Say. Law of Dam. 245. S. C.*

For more concerning Overseers, vide *Orders of Removal, Poor, Rates, &c.*

[G]

## Oyer of Records, Deeds, &c.

4 Vin. 159.

### (B) Given, of what Thing.

1. **OYER** of deeds, &c. is demandable by the plaintiff or by the defendant. If the plaintiff in his declaration *necessarily* make a *profert in curia* of any deed, writing, letters of administration, or the like, the defendant may pray *oyer*, and must have a copy thereof given to him, if demanded. *R. T. 5 & 6 Geo. 2. (b).*
2. Formerly the defendant was allowed *oyer* of the original writ, in order to demur or plead in abatement for any supposed insufficiency or variance. (2 *Wils.* 97.) But this indulgence having been abused and made an instrument of delay, a rule was made, that a defendant be not allowed *oyer* of an original writ. *R. T. 19 Geo. 3. Dougl. 227, 8. 6 Term Rep. 363.*
3. It seems that *oyer* is not demandable of an act of parliament. 1 *Dougl.* 476.
4. Nor of a record, as letters patent enrolled in Chancery. *Rex v. Amery, 1 Term Rep. 149.*
5. If there are two counts for the same debt on one policy of insurance, defendant cannot have *oyer* of two policies. *Burr.* 243.
6. Where an original lease was lost, the court, on application, has ordered that a copy of the counterpart should be deemed good *oyer*. By Buller J. *Read v. Brookman, 3 Term Rep. 160.*

4 Vin. 163.

### (D) Demanded. In what Cases, it may or must be demanded, and how.

1. **WHERE** defendant is entitled to have *oyer* of a deed, plaintiff having made *profert* of it, it cannot be dispensed with by the court, nor can he be compelled to plead without it, even though the deed be lost. *Soresby v. Sparrow, 2 Stra. 1186; See 3 Term Rep. 153.*
2. But where the deed is in the hands of a third person the court will oblige him to give *oyer*, and produce it. 2 *Stra.* 1198.
3. So likewise where the deed was tortiously in the hands of the defendant. *Mathison v. Atkison, 3 Term Rep. 153. (note c.)*

(F) Demanded or given, at what Time.

16Vin. 164.

1. **OYER** must be demanded before rule to plead is out. *Barnes*, 241. 329. 268. 326.
2. And by the plaintiff oyer cannot be demanded in another term than that in which the plea is filed. *Per Buller J.* 1 *Term Rep.* 149.
3. There is no settled time prescribed for the plaintiff to give oyer; but the defendant shall in all cases have the same time to plead after oyer given as he had at the time of demanding it. *Powel v. Gay*, 2 *Stra.* 705. *R. T.* 5 & 6 *Geo.* 2. (b.) *Webber v. Austin*, 8 *Term Rep.* 356.
4. So shall the plaintiff where the defendant makes a *profert.* *Imp. Prac. K. B.* 243.
5. Oyer of a deed cannot, in strictness, be demanded but during the term it is pleaded. 1 *Term Rep.* 149.
6. And as a general imparlance is always to a subsequent term, it follows, that oyer of a deed cannot be demanded after such imparlance. (But see 2 *Ld. Raym.* 290.) A different doctrine is indeed laid down in one case, (12 *Mod.* 99. and see 2 *Show.* 210.) which must be understood of a *special* imparlance to another day in the same term. *Tidd's Prac. K. B.* 501.
7. The demand of oyer is a kind of plea, and should regularly be made before the time for pleading is expired. *Fowler v. Dyer*, *M.* 20 *Geo.* 3. *Tidd's Prac.* 502.
8. If it be not made till after that time, the plaintiff may consider the demand as a nullity, and sign judgment. But though oyer be not, in strictness, demandable, yet if it be given, the party demanding has a right to make use of it. *Jeffery v. White*, 2 *Dougl.* 476.
9. The time allowed for the defendant to give oyer of a deed, &c. to the plaintiff, is two days exclusive after it is demanded. 2 *Term Rep.* 40. If not given in that time, plaintiff may sign judgment. *Barnes*, 245.
10. If given, the plaintiff shall have the same time to reply after oyer given him by the defendant as he had at the time of demanding it. *R. T.* 5 & 6 *Geo.* 2. (b.)
11. Oyer demanded after rule to plead expired too late, no stay of judgment, though affidavit was for delay. *Barnes*, 241. 239.

(G) Pleadings.

16Vin. 166.

1. **D**EFENDANT may either set forth the oyer in his plea or not, at his election. *Simmons v. Parminter*, 1 *Wilf.* 97.
2. If oyer is granted of any instrument of record, and it is set forth, although the party was not entitled to such oyer, yet he shall



## Oyer of Records, Deeds, &amp;c.

shall therefore be entitled to take the whole instrument as part of his adversary's plea. *Jeffery v. White*, 2 Dougl. 475.

3. *Peckham* moved for a rule to shew cause why the defendant should not waive his demand of *oyer*, and plead. This was an action on a bond. The plaintiff had before filed a bill in the Exchequer for a discovery, and the defendant in his answer admitted that he had executed such a bond, and that he had destroyed it. *Buller J.* You have declared with a *profert*; and after that the court cannot say the defendant shall not have *oyer*. You should have declared that the bond was destroyed, and then it would have appeared on the record that the defendant was not entitled to *oyer*. All that we can do for you is to order that the production of a copy shall be *oyer*. But the plaintiff having no copy of the bond, and only the substance of it being stated in the bill in the Exchequer, a rule was obtained to shew cause why the declaration should not be amended. *Totty v. Nesbitt*, Tr. 24 Geo. 3. B. R. 3 Term Rep. 153. (notes).

4. Defendant after *oyer* may plead the general issue, without taking notice of the *oyer*, and plaintiff cannot, when he makes up the issue, insert the *oyer* at the head of the pleas; if he would avail himself of it, he must pray it to be enrolled at the head of his replication at his own expence. 2 *Stra.* 1241. *Willes*, 288. (n. c.)

5. In C. B. if *oyer* be prayed and not pleaded, plaintiff may insert it in the plea: it is only where it is not prayed, that he is obliged to insert it in his replication. *Barnes*, 327.

6. If defendant, after having craved *oyer* of a deed, do not set forth the whole deed, the plaintiff may sign judgment as for want of a plea, or the court will quash the plea. *Wallace v. Cumberland*, 4 Term Rep. 370.

7. If defendant pleads variance between writ and count, without *oyer*, he shall answer over. *Vanderplank v. Banks*, 2 Wils. 85.

8. In order to bring error, the party who insists upon *oyer* must enter his prayer on record. This is in the nature of a plea; and the other side may either counterplead or demur to it, and the court will give judgment thereon. 2 *Ld. Raym.* 969. But it is no error to grant *oyer* where it ought not to be. *Ibid.*

9. Where a deed is pleaded the plaintiff cannot reply new matter in the deed, but must set it out upon *oyer*. *Stibbs v. Clough*, 1 *Stra.* 226.

10. Plaintiff may sign judgment for non-payment for copy of indentures of which *oyer* was prayed. *Barnes*, 238.

## Parceners.

### (A) *Of what Thing there may be Parceners.*

16Vin. 168.

TO the passage cited from *Co. Litt.* 165. b. in pl. 1. &c. of the sect. to which this is a supplement, Mr. *Hargrave* has subjoined the following note :

“ In a late contest about the office of *Great Chamberlain*, which arose in consequence of the late Duke of *Ancafter’s* leaving two sisters his co-heiresses, one of whom was married to Mr. *Burrell*, the then Attorney-General made a report in conformity to the doctrine here stated by Lord *Coke*, as to the office of high constable ; and this report, of which I have a copy, contains a very learned investigation of the subject. But afterwards, when the case came before the lords, the judges gave it as their opinion, that the office belongs to both sisters ; that the husband of the eldest is not of right entitled to execute it ; and that both sisters may execute it by deputy to be appointed by them, such deputy not being of a degree inferior to a knight, and to be approved of by the king. See *Journ. Dom. Proc.* 25. May 1781, the Printed Cases of the several Claimants, and the *Parl. Reg.* for 1780, 1, v. 4. 258 to 297. *Hargr.* note 8. *Co. Litt.* 165. b.”

### (E) What Privileges the eldest or her Issue shall have. 16Vin. 171.

TO the passage cited from *Co. Litt.* 166. b. in pl. 3. of the sect. to which this is a supplement, respecting the privilege of an eldest co-parcener to present to an advowson, Mr. *Hargrave* has subjoined the following note :

“ *Acc. P.* 18. *E. Quare Impedit* 176. *Post.* 186. b. 3 *Co.* 22. b. 2 *Inst.* 365. 2 *Ro. Abr.* 346. *Mallory’s Quare Impedit*, 145. Three judges also held accordingly, *East.* 23 *Eliz.* in *Harris* and *Haies v. Nichols*, *Cro. Eliz.* 18. But *Anderson*, Chief Justice, doubted, whether a grantee should have the privilege. In *Kielway* there is a case of 18 *Hen.* 7. in which *Frowicke*, Chief Justice, is made to give it to the grantee of the eldest sister, only where it has been once exercised by herself. But he afterwards doubted his own distinction, and seemed to incline to the grantee’s right generally ; in consequence of which the report concludes thus : *stude bene et quare.* *Keilw.* 49. Upon the whole therefore it seems, that the point is not quite settled ; and to determine it properly would require a very careful examination of the numerous cases cited by *Ld. Coke* here and in the

“ second

" second Institute. See 7 *Ann. c. 18*. I was led into this note, " by a reference to the case from *Cro. Eliz.* in a *Coke upon Littleton* of the late Mr. *Beversham Filmer*; and by an opinion of " the same very learned gentleman, in which he represents the " point to be doubtful, and therefore dissuaded accepting the " title to the next presentation of an advowson belonging to three " sons as heirs in gavelkind, unless they would all join in the " grant." *Harg. note 2. Co Litt. 166. b.*

16 Vin. 175. (L) Ouster. What shall be said a Disseisin by one of the other.

IN a writ of error from the Court of King's Bench in *Ireland*, the case was, that a Roman Catholic died seised of certain lands, leaving two sons, R. and J. By the *Irisb* statute 2 *Anne*, estates in fee simple or fee tail belonging to Roman Catholics, descend in gavelkind; but, on the death of the Catholic R. entered alone, and held the same until his death, for sixty-two years, and in the mean time settled the same by fine and recovery, to which J. his brother was privy. On the death of R., in 1766, leaving two daughters, J., the lessor of the plaintiff, brought an ejectment against his two nieces, for two-thirds of a moiety of the lands whereof his brother died seised, as co-heir in gavelkind with his brother, and recovered them by default. He then brought an ejectment against the widow of R. for the other third of the moiety, which she claimed as her dower, and also under the settlement. On the trial the judge directed the jury to find a verdict for the plaintiff; upon which a bill of exceptions was tendered, setting out in substance this case, which was returned into B. R. in *Ireland*, and thereupon the court gave judgment for the defendant. A writ of error was then brought in B. R. at *Westminster*, and it was argued for the defendant, that sixty-two years sole possession, and the fine, were a bar to this action by common law; that this was a question, not between joint-tenants, or tenants in common, but tenants in gavelkind, who were male coparceners; that the true state of the law as to coparceners was this, 1st, If both enter, there must be actual ouster, to make a disseisin. 2dly, If one enters generally, and takes the profits, this is no disseisin. 3dly, If one enters *specially*, as in the present case, claiming right to *the whole*, and taking the whole profits, this is a disseisin; but after her death, the sister may enter, unless barred by the statute of limitations. 4thly, If, after a special entry, one by seoffment or fine, destroys the coparcenary, and takes back an estate in fee and dies, the entry of the sister is barred. Here R. entered alone in 1704, took the whole profits, settled the estate in 1727, with the privy of J.; levied a fine, and died after sixty-two years possession. The entry of J. is therefore clearly barred, and he cannot maintain any ejectment. The court said, that the statute 2 *Anne*, made the lands of Roman Catholics

Catholics descend in gavelkind, that was its whole effect, and then the adverse possession of one gavelkind tenant, would not operate as the possession of both. That was a qualified rule, and in the present case the acts of ownership, fine, &c. made an actual ouster, and the statute of limitations operated as an extinguishment of the remedy of the one, and not as giving the estate to the other. *Davenport v. Tyrrell*, 1 Black. 675.

## Parliament.

[A]

### (B) Who may sit and have Privilege in the House of Commons. 16 Vin. 182.

1. 15 *GEO.* 2. c. 22. Commissioners of revenue in *Ireland*; of the navy, clerks in the following offices; treasury, auditors, tellers, or chancellor of exchequer's offices; admiralty, paymaster of army or navy, secretaries of state, salt, stamps, apples, wine-licence, hackney-coaches, hawkers and pedlars, or having office in *Minorca* or *Gibraltar*, except commission officers in regiments, are excluded from being members of the house of commons.

2. 22 *Geo.* 3. c. 45. Every person who shall directly or indirectly, by himself or by any other to his use, hold any contract made with the commissioners of the treasury, navy, or victualling-office, or the master-general, or board of ordinance, or any other person, for the account of the public service; or shall in pursuance of any such contract, furnish any money to be remitted abroad, or any wares, or merchandize to be used in the service of the public, shall be incapable of being elected, or sitting, or voting in the house of commons during the time he shall hold such contract.

3. 33 *Geo.* 2. c. 20. Members, before they vote or sit in parliament shall deliver in a schedule of their qualifications according to 9 *Ann.* and swear to it, except eldest sons of peers, or persons qualified to be knights of a shire, members of universities, or *Scotch* members.

4. 14 *Geo.* 3. c. 58. repeals 1 *H.* 5. and so much of 8th, 10th, and 23d *H.* 6. as relates to residence of electors or elected.

5. 10 *Geo.* 3. c. 41. The speaker, during recess of parliament, may issue his warrant to the clerk of the crown, to make out a writ for electing a member in the room of one dead during recess, on the death being certified under the hands of two members; he must give notice in the gazette, and not issue warrant till fourteen days after, nor unless the return of the deceased member was brought in fifteen days before the end of the session preceding his death.

## Parliament.

6. The speaker is not to issue his warrant for a new election, unless the death was certified, so that the notice might be given 14 days before the meeting of parliament, nor where a petition was depending at the last prorogation or adjournment. 15 Geo. 3. c. 37. s. 1.

*Sec. 2.* He may issue his warrant on a member becoming a peer, in the same manner as if he were dead.

## (B) As to Elections.

1. 18 GEO. 2. c. 18. Every elector, if required, shall swear he has a freehold of 40s. *per annum*, and what and where, and whether he has had it a year, or come to it by descent, marriage, marriage-settlement, devise, or promotion; that it was not granted on purpose to qualify; his place of abode; that he was twenty-one, and has not polled before.

*Sec. 3 and 4.* Elector must have been assessed to the land tax within twelve months before, except for chambers, &c. not usually assessed; and duplicates of assessment shall be kept among the records of the quarter sessions.

*Sec. 5.* Persons not qualified, voting, or voting more than once, forfeit 40s.

*Sec. 6.* Taxes or rates are not to be deemed charges within the meaning of this act.

2. 31 Geo. 2. c. 14. Persons holding their estates by copy of court-roll are not thereby entitled to vote for counties; if they vote they forfeit 50s. to any candidate for whom they did not vote.

3. 3 Geo. 3. c. 15. A freeman shall not vote, unless admitted twelve months before the first day of election, except entitled to freedom by birth, marriage, or servitude.

4. 3 Geo. 3. c. 24. requires annuities to be registered with the clerk of the peace twelve months before the day of election.

5. 10 Geo. 3. c. 16. and 11 Geo. 3. c. 42. after the day appointed to consider a petition, the first time there are one hundred members present, the names of forty-nine present are to be drawn out of the whole house; each party names one not drawn; each party then strikes out alternately one of the forty-nine till they reduce them to fifteen; these fifteen make a committee to determine the election; thirteen must be present. None can vote who have not been present every sitting; they have power to send for persons, papers, &c. and to examine on oath. Notice is to be given to all parties; if there were more than two parties interested, the thirteen ballotted members nominate the two nominees. This act is made perpetual by 14 Geo. 3. c. 15.

6. In an action on the statute for bribery at an election, the plaintiff had a verdict; two objections were taken: 1st, That the person bribed did not vote according to the bribe; but the court held, that the offence of the person giving the bribe was complete, although the other should afterwards repent. 2dly, It was objected

jected that the declaration was not proved, as the person bribed had given a note to return the money if he did not vote according to the bribe, and that it was therefore a loan and not a gift as stated in the declaration; but the court held it to be clearly a bribery by gift under colour of a loan, and gave judgment for the plaintiff. *Sulston v. Norton*, 1 *Bl. Rep.* 317.

7. It was ruled, that bribery at elections was punishable at common law, and continued to be so, notwithstanding the stat. 2 *Geo.* 2; but that since that statute, on account of the heavy penalties therein, the court ought to be cautious of granting an information for the offence. *Rex v. Pitt*, 1 *Bl. Rep.* 380.

8. Action on the statute of bribery, and verdict for the plaintiff. The counsel for the defendant took three objections. 1st, That the declaration stated the party to have been bribed to vote for *L.* and Lord *E.* whereas the evidence was, that it should be for *L.* and his friend. 2d, That the declaration stated Lord *E.* and *C.* to have been candidates at the election, whereas no evidence was given to prove that averment. 3d, That it stated the persons bribed to have had a right to vote, of which no evidence was given, except the fact of their having voted. These exceptions were overruled. *Combe qui tam v. Pitt*, 1 *Bl. Rep.* 523. S. P. (As to the last point,) *Rigg v. Gugenven*, 2 *Wils.* 395.

9. The defendant being bribed at an election, in order to indemnify himself, (according to the 2 *Geo.* 2.) made affidavit of the same offence against the person who bribed him; upon which one of the candidates brought an action against the person giving the bribe, and another person brought the action against the defendant. The question was, whether he was indemnified or not? It was objected that the defendant was not indemnified, not having been plaintiff in the other action; but the court held the affidavit a sufficient discovery. The next objection was, that there was not due diligence used in that prosecution, as that the verdict in the present action was prior to it; but this was overruled, the want of diligence appearing to have been accidental. Lastly, It was objected, that the conviction in this action being prior to the other, the indemnity could not operate against it: but the court held, that although the conviction must follow, yet the indemnity arises from the discovery. Execution was therefore stayed by rule of court. *Sutton v. Bishop*, 1 *Bl. Rep.* 665.

10. It was ruled, that an action on the 7 & 8 *W.* 3. for a false return was within the statute of jeofails; that statute being remedial; and that such action lay, although there was no resolution of the House of Commons ascertaining the right of election. *Wynne, Bart. v. Middleton*, 1 *Wils.* 125.

## (C) Extent of Privilege.

**A** Writ of *habeas corpus* being directed to the Earl of Ferrers; before an attachment was moved for the House of Lords was petitioned for leave to proceed against him; whereupon that house came to a resolution, *that no peer or lord of parliament hath privilege of peerage or parliament against being compelled by process of Westminster-Hall to pay obedience to a writ of privilege directed to him; and therefore an attachment issued against the earl.* *Rex v. Earl of Ferrers, 1 Burr. 632.*

## (D) Power of imprisoning, and Effect of Prorogations.

**W**HERE to a *habeas corpus* the return was, that the prisoner was in custody under the warrant of the Speaker of the House of Commons, for having committed the messenger of the house for execution of their warrant; the court held the return good; for the House of Commons is the only judge of its privileges. *The Case of the Mayor of London, 3 Wils. 188.*

## Partition.

16 Vin. 232

## (R) Writ of Partition. Proceedings therein.

1. **C**HANCERY entertains suits for partition though a proceeding at common law, and though no express authority be given by the stat. to that court, as to joint-tenants. *2 Ves. jun. 124.*

2. Bill for partition is a matter of right, and there is no instance of not succeeding in it, but where there is not proof of title in plaintiff. *Ambler, 236.*

3. The strongest arguments of inconveniency will not prevail, though the plaintiff was entitled to 3 or 400 acres, and the defendant to four or five acres only, and though the defendant would rather have given up his part than be at the expence of a partition, yet it was agreed that it should be at the expence of both parties. *Ibid. 237.*

4. And the difficulty, however great, of making partition, is no objection to making a decree for one. *Ibid. 589.*

5. Where an infant is one of the parties, whether plaintiff or defendant, he has time to shew cause against the decree, and therefore

therefore the court will order the other parties' conveyance to be respited till the same time. *Ambler*, 197.

6. A commission to set out lands shall not be granted, if defendant denies plaintiff's title, and says he has no lands in his possession belonging to plaintiff. *Bishop of Ely v. Kenrick*, M. 1732. *Bunb.* 322.

7. If there is a mistake (as in the date of the year when a thing was done) in the return of a commission, the court, on motion, will order it to be amended by the commissioners. *Rouse v. Barker*, *Bunb.* 251.

8. No partition of land can now be made without deed. *Johnson v. Wilson*, *Willes*, 248.

9. A new compulsory mode of partition has sprung up, and is now fully established, namely, by a decree of Chancery exercising its equitable jurisdiction on a bill filed, praying for a partition; in which case it is usual for the court to issue a commission for the purpose to various persons, who proceed without a jury. *Vide Hargrave's & B.'s edit. of Co. Litt. lib. 3. sect. 248. (note 23.)*

10. A power to sell or exchange extends to making a partition. *Abel v. Heathcote*, 4 *Brown's Reports in Chan.* 278.

### Pleadings, and what shall be recovered.

16 Vin. 239.

1. BY Stat. 8 & 9 Will. 3. c. 31. after process of *pone* or *attachment* returned on a writ of partition, affidavit being made by any credible person of due notice given of the said writ of partition to the tenant, &c., and a copy thereof left with the occupier, &c. at least 40 days before the day of the return of the said *pone* or *attachment*, if the tenant, &c. do not, within 15 days after the return of such writ of *pone*, &c. cause an appearance to be entered in the court where the process is returnable, then, in default of appearance, the court may proceed to examine the demandant's title and quantity of his part to purpart, and award a writ of partition accordingly. *Vide 2 Bl. Rep.* 1134.

2. And after such writ executed, upon eight days' notice to the tenant of the land, and returned, judgment final shall be given, which shall conclude all persons after notice, though not named in the proceeding, and though the title of the tenant be not truly set forth.

3. Provided if any within a year after judgment, or if infant, *covert*, *non-sane*, or out of the realm, within a year after inability removed, by motion shew a probable bar, or that the plaintiff had not title to so much, the court may admit him to plead, &c., or if he shews an inequality of partition, the court may award a new partition.

4. After return of the partition by the sheriff, there shall be final judgment *quod partitio predicta stabilis in perpetuum teneat.* 2 *Bl. Rep.* 1159.



16 Vin. 241.

## (Z) Equity. Decreed in Equity, and how.

1. *MARY* and *Susan Jackson*, the daughters and co-heirs of *James Jackson*, being seised in fee of certain lands, the former married *Thomas Ingram*, and the latter *Wm. Rittle*, and by a mutual agreement of their husbands in 1686, a partition was made of the said premises between themselves and the heirs of *Mary* and *Susan*; the husbands are both dead, the bill is against *Susan Rittle* to confirm the division of the said estates: the agreement of the husbands cannot bind the inheritance of the wives. 1 *Atk.* 541. Nov. 1739. *Ireland v. Rittle*.
2. A parol agreement for equality of partition of a long standing by persons who had a right to contract, and accordingly put in execution, will be established in this court. *Ibid.* 542.
3. If a joint-tenant, upon equality of partition, thinks proper to accept of a contingent uncertain advantage, where one moiety of the land is of superior value to the other, it will not vacate the agreement. *Ibid.*
4. On a bill for a partition between two joint-tenants, the plaintiff must shew a title in himself, and not allege generally, that he is in possession of a moiety. 2 *Atk.* 380. July 1742. *Cartwright v. Pultney*.
5. Two tenants in common in tail of a copyhold estate agree to make partition; each surrenders the part allotted to the other: held, the entail was only as to a moiety. *Ambl.* 368. Feb. 1759. *Oakley v. Smith*.
6. Partition between an adult and an infant, as the infant has time to shew cause till twenty-one, the conveyance from the adult ordered to be respited till the same time. *Ambl.* 197. Nov. 1743. *Tuckfield v. Buller*.
7. Bill for partition is matter of right and of course. *Ambl.* 236. July 1754. *Parker v. Gerard*.
8. The difficulty in making a partition is no objection to the making a decree for a partition. *Ambl.* 589. Oct. 1750. *Warner v. Byres*.
9. Partition is a proceeding at common law, but Chancery entertains suits for it. 2 *Ves. jun.* 124.
10. On a bill for partition, the costs of executing the commission, and of all necessary proceedings in the cause, must be defrayed by the parties in proportion to their interests. 2 *Ves. jun.* 568. 1795. *Calmady v. Calmady*.

## Partners.

Who shall be; and their Power over the joint 16 Vin. 242.  
Effects.

1. **T**HE true criterion of determining (when money is advanced to a trader) whether it constitutes a partnership or a loan, is to consider whether the profit or premium is certain, and defined, or casual, and depending upon the accidents of trade. *Per De Grey C. J. and Blackstone J. Grace v. Smith. C. B. 2 Black. 1000.*

2. S. and R. entered into a partnership for seven years, but soon afterwards agreed to dissolve it. The articles were not cancelled, but the dissolution was notorious. It was agreed at the time of the dissolution, that S., who retired from the business, should let part of his share remain in the hands of R. for seven years, to receive 5 per cent. interest, and also an annuity for that time, for all which R. gave his bond to S. This is not a continuance of the partnership, for S. has no specific lien upon the profits of the trade, and cannot be considered as having a share in them. *Grace v. Smith, C. B. 2 Black. 998.*

3. But where an agreement to dissolve a partnership recited, "That B. being desirous to have the profits of the trade to himself, and P. being desirous to relinquish his right to the trade and profits, it was agreed, that B. should give P. a bond for the sum he brought into the trade, with interest at 5 per cent.; and further that he should pay P. 200l. per ann. for six years, as in lieu of the profits of the trade, and B. covenanted that P. should have free liberty to inspect his books." Lord Mansfield held, that P. was a secret partner. For this was a device to make more than legal interest of the money, and if it was not a partnership it was a crime, and it shall not lie in P.'s mouth to say it is usury. *Bloxham and Fourdrinier v. Pell and Brook, Sitt. Mid. after Hil. 1775. Cited Ib.*

4. If one of two partners become bankrupt, the solvent partner may, if for a valuable consideration, and without fraud, dispose of the partnership effects, and if he afterwards fail, the assignees, under a joint commission against both, cannot maintain trover against the *bonâ fide* vendee of such partnership effects. *Fox et al. v. Hanbury et al., Cowp. 445. Vide also argument of Buller J. in Salomons v. Nissen et al., 2 Term Rep. 682.*

5. A number of persons employed a broker to purchase a lot of tea at the East India company's sale, of which they, together

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with himself, were to have separate shares, the lots being too large for one dealer. The company gave the broker a warrant for the delivery of the tea on payment being made. The plaintiffs advanced a sum of money on this warrant and the broker's note, who afterwards became a bankrupt. These employers of the broker are not to be considered as partners, or liable to the plaintiffs for more than the proportion upon their several specific shares of the lot. *Howe v. Dawes et al.*, Doug. 356.

6 An act of bankruptcy by one partner is, to many purposes, a dissolution of the partnership by virtue of the relation in the statutes, which avoids all the acts of a bankrupt from the day of the bankruptcy, and from the necessity of the thing, all his property being vested in the assignees, who cannot carry on a trade. *Coke's Bankrupt Laws*, 554. *Hague v. Rolleston*, 4 Burr. 2176. *Smith v. De Silva*, Cowp. 471.

1 (Vin. 242.)

## (A) How liable to Creditors.

1. IF an action be brought against one partner only upon a partnership account, he cannot give in evidence that there is another partner who is not joined in the action, but must plead it in abatement. *Rice v. Shute*, 5 Burr. 2611. 2 Black. Rep. 695. S. C. *Abbot v. Smith*, 2 Black Rep. 947. S. P.

2. If a bill be brought against one partner for a joint demand, and the other is not amenable to the court, being out of the kingdom, the partner before the court shall pay the whole. *Darwent v. Walton*, 2 Atk. 510.

3. If a creditor of one partner take out execution against the partnership effects, he can only have the undivided share of his debtor; and must take it in the same manner that the debtor himself had it, and subject to the rights of the other partner. Cited *per* Lord Mansfield in *Fox v. Hanbury*, Cowp. 449. as laid down by Lord Hardwicke in *Ship v. Harwood*, in Chan. 6th July 1747. *Vide West v. Skip*, 1 Vesf. 239. S. C.

4. The assignees under a commission of bankruptcy, must be in the same state. *Fox v. Hanbury*, Cowp. 449.

5. Where on an execution against one of two partners, the partnership goods were taken and sold, the court, on motion, directed that it should be referred to the Master to take an account of the share of the partnership effects to which the other partner was entitled, and that the sheriff should pay a part of the money levied, equal to the amount of such share, to his assignees, he being a bankrupt. *Eddie v. Davidson*, B. R. Dougl. 627.

6. Acts subsequent to the time of delivering goods on a contract may be admitted as evidence to shew that the goods were delivered on a partnership account. But if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person who has afterwards become a partner, (not even an acknowledgment that he is liable, or his accepting a bill of

of exchange drawn on them as partners for the very goods,) shall make him liable in an action for goods sold and delivered; though he will be liable in an action on the bill of exchange. *Saville v. Robertson and Hutchinson*, 4 Term Rep. 720.

7. If partners dissolve their partnership, they who deal with either without notice of such dissolution, have a right against both. *Per Lord Mansfield in Fox v. Hanbury*, Cowp. 449.

8. If two are partners as *attornies* and *conveyancers*, and one receives money to be laid out on mortgage, the other is liable for the amount, though his partner gave a separate receipt for it in his own name, and no procuration money was paid for their trouble. *Willet v. Chambers*, Cowp. 814.

9. A. and B., ship agents at different ports, enter into an agreement to share in certain proportions the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them; and the agreement provides, that neither shall be answerable for the acts or losses of the other, but each for his own. Held in *C. B.* that notwithstanding this they become liable as partners to all persons with whom either contracts as such agent. *Waugh v. Carver and others*, 2 H. Black. 235.

10. If two joint-traders owe a partnership debt, and one of the partners gives a bond as a collateral security for payment of this debt; here the joint-debt may be sued for by the partnership creditor, who may likewise sue the bond given by one of the traders. 3 P. Wms. 408. Hil. 1735. *Ex parte Rowlandson*.

11. Where one partner is out of the kingdom, the partner before the court shall pay the whole of a joint-demand. 2 Atk. 510. Feb. 1742. *Darwent v. Walton*.

*And service of subpoena upon one partner here deemed good service upon his partner in France.* Bunb. 107. 1722. *Lady Carrington v. Cantillon*.

12. Partners continue joint tenants in the stock, notwithstanding it changes in the course of trade, and are seized *per my and per tout*, and on account each must have all allowances before a judgment creditor of the other can come on the other's share. 1 Vesf. 239. 1749. *West v. Skip*.

13. Partnership effects first applied to pay partnership debts. *Ibid.* 1 Vesf. 456.

14. Judgment in an action against a surviving partner remains a partnership debt still. 2 Vesf. 265. April 1751. *Jacomb v. Harwood*.

15. A joint-creditor, by simple contract may go against the assets of a deceased partner, but cannot, before the account, retain separate property of that partner in his possession. 3 Vesf. jun. 566. Dec. 1797. *Stevenson v. Chiswell*.

16. Though one of the partners is an infant, an action must be brought against all three. 4 Vesf. jun. Aug. 1798. *Ex parte Henderfon*.

## Partners.

17. A separate creditor of a partner has no right against the joint property farther than the separate interest of that partner, viz. his share upon a division of the surplus, subject to the accounts of the partnership; therefore joint-property of an insolvent partnership, taken in execution for a separate debt, cannot be held against joint creditors. 4 *Ves. jun.* 396. Jan. 1799. *Field v. ———*.

18. Assignee, executor, or separate creditor, coming in the right of one partner against the joint property, comes into nothing more than the interest, subject to an account between the partnership and the partner, and therefore to the joint debts; assignee under a separate commission of bankruptcy has only the same right to stand in the place of the bankrupt by the common law, not under the bankrupt laws. *Ibid.* 397.

19. The court expressed great doubt whether the stock in trade, being in the possession of the bankrupt solely, the claim of partnership could be sustained upon the stat. 21 *J. I. c. 19. s. 10, 11.* 4 *Ves. jun.* 756. July 1799. *Binford v. Demmett.*

## (B) Disputes between the Partners and their Debtors,

1. **A**N action cannot be maintained by several partners for brandy sold by one of them living in *Guernsey*, and put into half ankers, and ready slung for the purpose of smuggling, though the other partners, who resided in *England*, knew nothing of the sale, for it is a contract by subjects of this country, made in contravention of the laws, and must be considered in the same light as if all the partners lived in *England*. *Biggs & al. v. Lawrence*, 3 *Term Rep.* 454.

2. The plaintiffs, together with *A.* and *B.* being owners of one privateer, and the defendant of another, a prize was taken, condemned, and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded with costs, which were paid solely by the plaintiffs; *A.* and *B.* having in the meantime become bankrupts. An action cannot be brought by the plaintiffs alone for a moiety of the restitution money and of the costs, because it was either a partnership transaction, when *A.* and *B.* ought to be joined; or not, when separate actions should be brought by each of the persons paying. *Graham et al. v. Robertson*, *B. R.* 2 *Term Rep.* 282.

3. Where money is owing to two partners, and after the death of one it is paid to a third person, the surviving partner may maintain an action for money had and received in his own right, and not as survivor. *Smith v. Barrow*, 2 *Term Rep.* 476.

(C) One dies. Disputes between the Executor or Administrator of the Deceased and the Survivor, &c.

1. IF one partner dies, the debts and effects survive, but yet the survivor is considered in equity as a trustee for the representatives of the deceased, who have a specific lien upon the stock; but such lien may be lost by *laches*, or consent to leave the goods in the survivor's power (a), when, if he becomes bankrupt, the specific lien is lost under 21 J. 1. c. 19. *Per Hardwicke C. West v. Skip*, 1 Ves. 242. *Ib.* 456. (a) *Vide* *Rowles*, 1 Atk. 165. 1 Ves. 348.

2. An agreement was entered into between the plaintiffs and one *H.* empowering him to contract for the building a ship for them, and for the fitting her out &c., with a covenant that the subscribers, *i. e.* the plaintiffs, and *H.* should pay proportionate shares, according to the several parts of the money, and all the charges and disbursements in equipping, &c. *H.* dying intestate, a bill was brought against his representatives, by the partners, that they should have a specific lien upon what should be due to *H.* for his share, for the money they had paid to the tradesmen for fitting out the ship, &c. Lord *Hardwicke* considering this to be a partnership concern decreed accordingly; saying that the court always laboured to decree a partnership to prevent other creditors from running away with that which the plaintiffs had expended. *Doddington v. Hallet*, 1 Ves. 497.

3. Where *A.* and *B.* enter into articles of partnership, and it is provided by them, that notwithstanding the death of *A.* the trade shall be carried on by his representatives jointly with *B.*; if *B.* die, his representatives shall not be entitled to carry it on. At the Rolls, Oct. 30, 1750. *Pearce v. Chamberlain*, 2 Ves. 33.

4. On a bill for specific performance of an agreement to let the plaintiff into trade, his Honor said, he never knew an instance that the court decreed an account of the profits of the trade from the time the plaintiff ought to be let in. Where a trustee has money of an infant's to lay out in the funds for the infant's benefit, and lays it out in trade, which produces 10*l.* per cent. the court will give that infant an option, either to have interest for the money or the profits of the trade: but that is a very singular instance and the only one of the kind. *Anonymous*, at the Rolls, July 9, 1755. 2 Ves. 629.

5. The court would not decree performance of such an agreement, and then decree damages for the delay in not letting in the plaintiff sooner, for that the plaintiff might have had, if he had used his remedy at law. *Id. Ib.*

## (D) One dies (or becomes Bankrupt.) Disputes between Creditors and the Survivor, &amp;c.

1. *A.* and *B.* partners as bankers, gave a note to *C.* for a sum of *A.* money. Afterwards *A.* dying and leaving *B.* one of his executors, *C.* called upon *B.* for a further security than the note, and judgment was entered up in an action against him, not as executor of *A.* but as a surviving partner for a partnership debt. This is an extinguishment of the demand on the note, but it continues a partnership debt, only bettered by the security. *Fa-comb v. Harwood*, at the Rolls, *Per Sir J. Strange.* 2 *Vesf.* 265.

See 1 Atk.  
227. and  
*Ex parte*

*Barrell*, 22d July 1783, Cooke's B. L. 556.

2. One of three partners in a ship and cargo, the cost and outfit of which was 4568*l.*, pays only 410*l.* in part of his third share, and gives his notes for the remainder; but before they become due is declared a bankrupt. The other partners cannot, by voluntarily discharging the notes, stand in his place for any share of the profits, but the assignees are entitled to a full third, both of the profits of the adventure and the value of the ship. For all the expence being incurred prior to the bankruptcy, if the voyage had proved a losing one the bankrupt would have been liable for the whole in proportion to the other owners; and as he had thus a right to a third of the profits at the time of the bankruptcy, his insolvency does not vary the right. The taking up the notes was the agreement of third persons, without the privity of the bankrupt or his assignees, and cannot vary their right. *Smith v. De Silva*, *B. R. Cowp.* 469.

The reporter states that Lord *Albany*, *C.* when he directed this issue, was extremely clear in the same opinion.

3. *A.* and *B.* being partners, *A.* receives, as assignee under a commission of bankrupt, 2563*l.* which, with *B.*'s privity, he applied in their joint trade, and entered on their joint-account. The partnership is afterwards dissolved, and the partnership effects are assigned over to *A.* who took upon him the debts. Afterwards a joint-commission issued against both of them, and new assignees were chosen in that commission, under which *A.* received the money. It was held in *B. R.* upon an issue out of Chancery, that this was no payment by *B.* so as to discharge him of the claim by the new assignees to the trust-money, but that both were liable to make it good. *Smith and others, Assignees of Lewis and Potter v. R. and T. Jamieson*, 5 *Term Rep.* 601.

4. Bankers, upon a deposit of money with them, give notes bearing interest; the partnership was dissolved; one of the partners soon afterwards died, and his creditors were called by public advertisement. Another partnership was formed by the survivors and others, who issued notes of the former partnership, and paid the interest of the deposit notes, for near two years, when they failed. The assets of the deceased partner held discharged. 3 *Vesf. jun.* 277. 1796. *Daniel v. Crest.*

(E) *Inter se.*

1. **PARTNERS** are joint-tenants in the stock and all effects; and they are not only so in that particular stock in being at the time of entering into the partnership, but they are to continue so throughout, whatever changes may happen in the course of the trade. And being seised *per my et per tout*, when an account is to be taken each is entitled to be allowed against the other every thing he has advanced, or brought in as a partnership transaction, and to charge the other in the account with what the other has not brought in, or has taken out more than he ought; and nothing is to be considered as his share, but his proportion of the residue on balance of the account. *Per Lord Hardwicke C. in West v. Skip, 1 Vesf. 242. Ib. 499. S. P. Vide also Fox v. Hanbury, Cowp. 445, Smith v. De Silva, Ib. 471. Goss v. Dufresnoy, Davies, 371. Cooke's Bank. Laws, 552.*

2. A partner has a specific lien not only on the original stock, but also on every thing coming in lieu during the continuance or after the determination of the partnership. *Id. ib. and Cowp. 449. Per Lord Mansfield.*

3. The partnership effects must be applied to pay the partnership debts before any other partner can claim any thing out of them, either for his share or debt. *Id. ib. 456.*

4. Three persons seised of land called *B.* in fee, entered into partnership for 21 years, erected mills thereon, and declared the uses of the land to be to themselves in fee as tenants in common. Afterwards they entered into another partnership by deed for 21 years, taking in four new partners, and in the partnership deed there was a covenant from the three original partners to stand seised of the land in trust for the co-partnership in the proportions in which they were respectively interested therein, and a proviso, that in case any of them wished to dispose of their share, that they might do so, giving notice to the other partners, in order that they might have an opportunity of purchasing. The partnership term being expired, they went on afterwards without any new agreement. One of the partners being dead, and the partnership dissolved, Lord *Thurlow C.* held, that this agreement was not sufficient to alter the nature of the property from real into personal, so as to make the deceased partner's share of it distributable to his representative, according to the rules of law regulating the latter. *Thornton v. Dixon, 3 Brown, 199.*

5. One partner may maintain an action for money had and received against the other partner for money received to the separate use of the former, and wrongfully carried to the partnership account. *Smith v. Barrow, B. R. 2 Term Rep. 476.*

6. One partner cannot recover a sum of money received by the other, unless on a balance struck, that sum is found due to him alone. *Per Buller J. Ib.*



7. One partner may be creditor of another, and prove his debt under a separate commission. *Ex parte Drake*. Cited 1 *Atk.* 225.

8. Where two enter into articles of partnership for seven years, in which is a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the seven years are expired, and account together, and strike a balance, which is in favour of the plaintiff, including several items not connected with the partnership, and the defendant promises to pay it, an action of *assumpsit* lies on such express promise, and the plaintiff need not bring covenant upon the articles. *Foller v. Allanson*, 2 *Term Rep.* 479.

So, though no other articles had been introduced into the account but those relating to the partnership. *Vide Moravia v Levy*. Cor. Buller J. at G. Hall, Mid. 1786.

9. One part owner of a ship, freighted it, although the other expressly dissented; the ship and cargo were lost, and held by his Honor, that as the party dissenting should not be entitled to any advantage from the freight, so he should not be answerable for the loss. And he said that the printed report of *Strelly v. Winson*, 1 *Vern.* 297. which is *contra*, was not right, but differed greatly from the decree. *Horn v. Gilpin*, at the Rolls, 15 *Feb.* 1755. *Ambl.* 255.

10. In a cause for an account of a partnership, both parties being dead, a receiver shall be appointed; but it is otherwise where one partner survives, for there was a confidence between the parties. *Philips v. Atkinson*, at the Rolls, 13 *Nov.* 1787. 2 *Brown*, 272.

11. Where money to fit out privateers was raised by shares, and 30 shares remained undisposed of, and a prize was taken, Lord Hardwicke C. decreed the undisposed shares belonged to the managers, (whether they purchased them after the capture or not,) and that they were not to be divided among the other owners; for in case of loss they would not have been liable for them. *Blunt v. Cumyns*, 2 *Ves.* 331.

12. In all sea adventures the acts of a majority of the partners binds the whole. 1 *Bro. Par. Ca.* 90. 1704. *Viscountess Dowager Falkland and others v. Lord Cheney*.

13. Three persons agree to become partners, and equally contribute to raise a joint-stock. The business was carried on by one of them only, and no articles were executed, because there were reasons for keeping the partnership secret. Held, that a draft of articles, together with a stated account, and the payment of money by the acting partner to the others, were sufficient evidence of the partnership, whereon to ground a decree for an account. 1 *Bro. Par. Ca.* 1707. *Worts v. Pern*.

14. One of several partners, who is treasurer for the whole, enters into a contract with A. and afterwards failing, his estate is vested in trustees. Though the contract with A. concerns the partnership business, yet he is not entitled to any satisfaction out of the treasurer's share of the partnership effects, but must come in

in equally with the rest of his creditors; the money due to *A.* upon the contract not being for wages. 1 *Bro. Par. Ca.* 384. 1713. *Ball v. Lord Viscount Laneshorough.*

15. *A.* agreed to take his nephew into partnership with him, and with his own hand made the following entry in a new set of books, &c. viz. "Debtor to account of stock in trade, for so much stock "I put into the company's trade with my nephew *H.*, 10,000*l.*" The name of *H.* was for some time used as partner in the trade, but no articles were ever entered into between him and his uncle, nor was any part of the stock or profits received by or made good to him. *H.* is not entitled to an account. 1 *Bro. Par. Ca.* 432. 1714. *Jacobson v. Henekenens.*

16. *A.*, on behalf of himself and partners, enters into a contract with *B.*, but the name of *A.* only was used in the contract. *A.*'s partners are liable to him. 3 *Bro. Par. Ca.* 127. 1725. *Brown v. Gibbins.*

17. If a partner assigns his share for a valuable consideration to a person not having notice of the partnership, that is a strong case for the purchaser, because he gains the legal interest; but it depends on the course of trade, which governs in mercantile matters. 1 *Ves.* 499. 1750. *Doddington v. Hallett.*

18. One partner, notwithstanding a temporary disorder, considered as partner. 2 *Ves.* 35. 1750. *Pearce v. Chamberlain.*

19. On decreeing performance of an agreement to let into a trade, an account back of the profits will not be decreed; but an infant, whose trust-money is laid out in trade, has an option. 2 *Ves.* 629. 1755. *Anon.*

20. One part owner of a ship freights it contrary to the express dissent of the other, the ship and cargo are lost, the loss falls wholly on the part owner who freights. *Ambl.* 255. Feb. 1755. *Hern v. Gilpin.*

21. Though a co-partnership agreement may alter the nature of real estates, yet it must be express so to do. 3 *Bro. Ch. Rep.* 199. Jan. 1791. *Thornton v. Dixon.*

22. An account of a partnership estate, and of monies paid to one of the partners during the partnership, directed at the distance of four years after its dissolution, under circumstances, shewing that one partner retired from a conviction that the partnership was insolvent, 4 *Bro. Ch. Rep.* 422. Aug. 1793. *Anderfon v. Maltby.*

23. Bill by a partner under a parol agreement charging misconduct in the other partner, and praying a dissolution, account, and injunction from executing securities in the name of the firm: demurrer to the prayer for a dissolution, because there was no writing between them, overruled. 3 *Ves. jun.* 74. March 1796. *Master v. Kirton.*

24. Partners bound by an instrument executed by one in the presence of the others. 3 *Ves. jun.* 578. Jan. 1798. *Burn v. Burn.*

25. The

## Partners.

25. The good-will of a trade carried on in partnership without articles survives, and is not partnership stock; profits accrued after the death of one partner are joint-property. 5 *Ves. jun.* 539. July 1800. *Hammond v. Douglas.*

26. The court cannot make an allowance to one partner for the expence of entertaining the customers; the accounts having been annually balanced without such an item is conclusive. 1 *Anst.* 94. 33 G. 3. *Thornton v. Proffor.*

27. The court will not appoint a receiver of a subsisting partnership trade, unless on the grossest abuses of some of the partners. 2 *Anst.* 453. 34 G. 3. *Oliver v. Hamilton.*

## Party.

16 Vin. 247. (A) Parties in Suits in Equity. Of the Necessity of having proper Parties; and who shall be in general.

1. **W**HERE several persons have claims upon an estate, in the different characters of purchasers, lessees, and mortgagees, the person claiming the ultimate beneficial interest may make them all parties to his bill. 3 *Bro. Par. Ca.* 122. 1725. *Edgworth v. Swift.*

2. On a bill for an account of fees and to establish a right, all persons who have any pretence to the right must be before the court, for they will be bound by a decree here; otherwise as to a judgment at law, which will not bind the right of a third person. 2 *Atk.* 296. 1742. *Pawlet v. Bishop of Lincoln.*

3. Where the jurisdiction is drawn out of a court of law, all the parties must be before the court, who are necessary to make the determination complete and to quiet the question. 2 *Atk.* 515. 1742. *Poore v. Clerk.*

4. A few creditors may sue for themselves and the rest, and the suit abates not by the death of one of them. 2 *Ves.* 312. 1751. *Leigh v. Thomas.*

5. Part of a ship's crew appoint two to be agents; on a bill to account the rest must be parties. 2 *Ves.* 312. 1751. *Leigh v. Thomas.*

6. Agents must sue in the names of their principals. 2 *Ves.* 313. *Ibid.*

7. Bill for a moiety; the other moiety was given to A. for life, and upon her death, to such persons as she should appoint, in default

fault of appointment to other persons : those persons must be parties. 3 *Bro. Ch. Rep.* 229. 1791. *Sherrif v. Birch.*

8. So to a bill by some of the residuary legatees, all must be parties. 3 *Bro. Ch. Rep.* 365. 1791. *Parsons v. Neville.*

(B) Parties to Bills in Chancery. Who.

16 Vin. 249.

1. BILL by plaintiff *Orlando Humphreys*, against his father Sir *Wm. Humphreys*, for an account of the personal estate of *Col. Lancashire*, deceased, who by his will gave 10,000*l.* to his wife *Helen* and daughter *Helen*, and disposed of the surplus, one-third to his wife, and two-thirds to his daughter, and left his wife and brother executors; defendant married *Helen* the wife, plaintiff married *Helen* the daughter; defendant made a large settlement on the plaintiff his son on his marriage. Plaintiff falling out with his father, brings his bill for an account of *Col. Lancashire's* personal estate. At the time of filing the bill, *Helen*, the defendant's wife, was dead, and also the brother, who was executor of *Col. Lancashire*, so that there was no executor or administrator of *Col. Lancashire* before the court, and therefore defendant demurred, and the demurrer was allowed. 3 *P. Wms.* 349. 1734. *Humphreys v. Humphreys.* Administrators.

2. Plea to a bill for discovery of assets, that the administrator was not a party, though it was a fact not disputed, that he was an insolvent person, allowed. 2 *Atk.* 51. 1740. *Asburth v. Eyre*, and 3 *Atk.* 341. S. C.

3. Where the parties have agreed to make the submission to an award a rule of court, and to be restrained from bringing a bill in equity, the arbitrators, notwithstanding the award be defective in point of law, may plead it in bar to a bill here, and in some instances, on motion, arbitrators have been ordered to be struck out from being parties. 2 *Atk.* 395. 1742. *Lingood v. Croucher.* Arbitrators.

4. Bill against a trustee (in a mortgage deed by which an annuity of 30*l. per ann.* was secured to plaintiff) who had assigned his trust; the assignee ought to be made a party; as the decree should be first against him, and the trustee to stand as a security. 2 *Bro. Ch. Rep.* 225. 1787. *Burt v. Dennet.* See *Obligee.* Assignee:

5. To a bill by assignee of a judgment, assignor is a necessary party. 1 *Ves. jun.* 463. 1792. *Cathcart v. Lewis.* Assignor.

6. One of two joint-executors and residuary legatees assigned his interest, and died; the assignee filed a bill to have half the residue transferred to him. The representative of the assignor need not be a party, unless there appear any doubt of the validity of the assignment. *Anstr.* 651. 36 G. 3. *Blake v. Jones.*

7. The Attorney-General need not be a party to a bill for a private charity, such as a voluntary society to provide for the members and their widows by weekly contributions. 3 *Atk.* 277. 1745. *Ann.* Attorney-General.

8. Nor to a bill for an account, where a legacy was given to a charity. 4 Bro. Ch. Rep. 38. 1792. *Chitty v. Parker*.

9. *Fowler* was outlawed in a civil action at the suit of *Peck*, an extent issued out against him, and an inquisition and a *levari facias* thereon; by virtue of the *levari* the sheriff levied 50*l*; and it was moved that it might be paid to *Peck*, which would put an end to all disputes between them: although *Fowler* consented by his counsel, yet the court would not do it, because nobody consented for the crown, and the king is entitled to the 50*l*. *Bunb.* 38. 1718. *Rex v. Fowler*.

10. *A.* is indebted to *B.*, *B.* outlawed *A.*; and *C.* having goods of *A.*'s in his hands, *B.* brings a bill against *C.* to discover what goods of *A.* *C.* has in his hands, *C.* may demur, for that *B.* makes no title to the goods, as having no grant from the crown; also for that the Attorney-General ought to be a party. 2 P. Wms. 269. 1725. ——— *v. Bromley*.

11. Ancestors of plaintiff had a yearly rent of 10 marks issuing out of the manor of *Newport Pagnel*, in the county of *Bucks*, and payable to them and their heirs; and this manor afterwards coming to the crown, upon a petition exhibited before *Hen.* 8. in his court of augmentations, it was decreed by the court, upon advice had with the justices of the Court of Common Pleas, that the rent should be paid by the king, his heirs, and successors, by the hands of his lord of the manor, to the receiver-general of the county; and now the manor being granted out of the crown to the defendant's father in fee, with a covenant to make an allowance to the patentee for that rent, or to the like effect; relief was prayed by the plaintiff against the patentee, and granted without making the Attorney-General a party. *Hard.* 181. 13 Car. 2. *Stafford v. Earl of Anglesey*.

12. The mother of a bastard by her will gave all her personal estate to the bastard, and made *B.* and *C.* executors; mother died; the bastard died intestate, without wife or issue; one of the executors brought a bill against the mother of her that was the mother of the bastard, and who had in her hands the bastard's portion, praying an account of the same. The defendant, the mother of the child's mother, demurred for want of parties, in regard the administrator of the bastard and the Attorney-General ought to have been brought before the court. Lord Chancellor.—The executor of the bastard's mother is entitled to the personal estate of his testatrix; and though this may be in trust for the bastard, yet as the executor has a legal title, he can give a good discharge to the defendant. 3 P. Wms. 33. 1729. *Jones v. Goodchild*.

13. Where a legacy was given to a charity, upon a bill for an account, it was held necessary to make the Attorney-General a party. 4 Bro. Cha. Rep. 38. 1792. *Chitty v. Parker*.

Bankrupt.

14. It is a general rule that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree; thus a residuary legatee need not be made a party; and for

for the same reason, in a bill brought by the creditors of a bankrupt against the assignees under a commission, the bankrupt himself need not be made a party. 3 P. Wms. 311. *in notis.*

15. Where a bond creditor brings a bill against an executor for an account of assets, and for satisfaction, it is no objection for want of parties, to say he has not brought other bond creditors, or creditors of a superior nature before the court, for any one bond creditor may bring his bill, as the court decrees only an account, and directs the executor to pay in a course of administration; and then the executor may before the Master set forth as he is constant of the estate and condition of the testator, what debts are prior to the plaintiff's, which he is obliged to pay, as having a legal preference. 3 Atk. 572. 1747. *Anon.*

16. Admiral *Lefstock* makes two instruments, one a deed by way of agreement between him and the defendant *Monk*, the other a will; by the deed he puts 4000*l.* into the hands of *Monk*, to pay to the admiral himself for life, an annuity of 160*l.*, and afterwards to pay 1000*l.* a-piece to *Peacock* and *Cockburn*, if they survived him; and an annuity of 100*l.* for life to Mrs. *Knowles* his housekeeper, if she survived him; the residue to *Monk*; and if the annuity of 160*l.* be unpaid after any quarter-day, *Monk* was to repay the 4000*l.* to Mr. *Lefstock* himself, to be placed out in the names of *Lefstock* and *Monk*: by the will he makes *Monk* executor and residuary legatee: after his death *Monk* made some payments, but discontinued them on notice of a bond creditor, apprehending that there would not be sufficient to pay that and the others also; which occasioned the present bill by three persons claiming the benefit of the trust arising under the deed. Objection, that they had not made the bond creditor a party, who had also filed his bill. Objection overruled. 1 Ves. 127. Bond Creditor.

17. *J. S.* late a governor in the *East Indies*, bought 1000*l.* *South Sea stock*, and accepted it in the *South Sea* books soon after he bought it. There was another *J. S.* owner of some *South Sea stock* at the same time, who went by the description of *J. S. of R.* *J. S. of R.* got the 1000*l.* of *J. S.* the governor placed to his account in the *South Sea* books under the description of 1000*l.* *South Sea* belonging to *J. S. of R.* In 1725 *J. S. of R.* transferred the 1000*l.* *South Sea stock* to his broker *B.* to sell it, which *B.* did. Governor *J. S.* died, when the fraud was discovered. The governor's widow demanded the 1000*l.* of *J. S. of R.*, who was confounded, and died the day after. Bill by the governor's widow against the administrator of *J. S. of R.* and the *South Sea* company. It was objected, that the broker should have been a party, but Lord *Harwicke* ruled not. *Barnes*, 324. Broker.

18. Bill by one trustee of stock against the other, to compel him to replace it, or give security according to engagement, when the plaintiff joined in transferring the stock into his name. It is not necessary that the *cestui que trust* should be a party. 3 Ves. jun. 75. 1796. *Franco v. Franco.* *Cestui que trust.*

19. Plaintiff being *co-lessee* with *A.* brought his bill to have the rent apportioned on a partial eviction by the lessor, and because the other lessee was neither plaintiff nor defendant, (for if he refused to be a plaintiff he might be a defendant;) the bill was dismissed with costs. *Strange*, 95.

20. A lease of lands is granted, with an exception of mines, &c. and the power of working the same; and the lessor covenants to make satisfaction for all damages and spoil of ground, to arise by working the mine. At the time of granting this lease, certain coal mines upon the premises were demised to *J. R.* In a bill brought for the performance of this covenant against the representatives of the lessor, it is necessary to make the lessee of the coal mines a party. 4 *Bro. Par. Ca.* 122. 1733. *Green v. Poole*.

Commis-  
sioners.

21. Plaintiff was bound for *Clarke*, (who was doorkeeper and accountant of the imprest money to the commissioners of excise,) for justly accounting, and for performance of his duty; and he filed his bill against the accountants to the commissioners of excise and the Attorney-General, praying that the accountants to the commissioners might discover certain books stated to have been delivered by *Clarke* to them on his going out of office; by which books it would appear that *Clarke* had paid more than he received; and that the proceedings might stay upon a *scire facias* issued against the plaintiff upon his bond for the recovery of a sum of money said to be unaccounted for by *Clarke*. The commissioners of excise should have been parties. *Bunb.* 291. 1730. *Makepeace v. Needler and others*.

22. Bill against an officer under the commissioners for building the new churches is improper. The commissioners only, and not the treasurer, ought to have been parties, for it is absurd to make the person who acts ministerially the sole party. 2 *Atk.* 144. 1740. *Vernon v. Blackerby*.

23. Bill by plaintiff, the undertaker of a navigation at *Thirsk* in *Yorkshire*, against the commissioners (named in the act of parliament for carrying it on) who had signed the several orders. There were three questions. Whether the defendants were personally liable? Whether all who were present at any meetings, and had signed some, but not all the orders, were liable to all the orders, or only as to such as they signed? Thirdly, Whether the plaintiff was right in filing his bill in this court, or his remedy was merely at law? The court was of opinion, that the commissioners who signed any of the orders are liable, and that the bill was well brought. 1 *Bro. Ch. Rep.* 101. *in notis.* 1778. *Horsley v. Bell*.

Committee.

24. Committee of a voluntary society entering into agreements with tradesmen, for the whole, it is sufficient to make them parties to a bill, and not necessary to add all the other subscribers. 1 *Bro.* 101. 1781. *Cullen v. Duke of Queensberry and others*.

Copyright.

25. The proprietor of a copyright must file separate bills against each bookseller selling copies of a spurious edition. So there

there must be separate bills upon distinct evasions of patents; otherwise of a right of fishery or the custom of a mill. 2 *Ves. Jun.* 486. 1794. *Dilly v. Doig. Mayor of York v. Pilkington*, 1 *Atk.* 282.

26. In a bill by the plaintiff against the *East India Company*, one of the officers of the company was made a defendant, in order to discover some entries and orders in the books of the Company; demurrer, for that defendant was not charged with being interested in the matters in question, and that his answer could not be read against the Company, as the answer of one defendant cannot be read against the other. Demurrer overruled. 3 *P. Wms.* 310. 1734. *Wych v. Meal.* Corporation.

27. A corporation may join in a suit to establish a claim, on behalf of its individual members. *Anstr.* 738. 26 *G.* 3. *Corporation of London and others v. Corporation of Liverpool.*

28. A bill was brought by a lessee of 21 years under the dean and chapter of *Winchester* against a lord of a manor and the tenant of a particular house, that it might be pulled down as it obstructed the plaintiff's way to his fields; and to be quieted in the possession of the way in future. Objection for want of parties, because the dean and chapter of *Winchester*, who are the owners of the inheritance, are not brought before the court, and it was held good. 2 *Atk.* 515. 1742. *Poore v. Clark.* Dean and Chapter.

29. It is not a general rule that any person who has assets may be made a defendant, for it would be of dangerous consequence to insist that you can make any person a defendant who has assets, unless you can shew to the court he denies that he has any such assets, or applies them improperly. 2 *Atk.* 33. 1739. *Simpson v. Vaughan.* Debtor and Creditor.

30. There were three obligors in a bond, plaintiff, the obligee, brought only one obligor before the court and the representative of another, but not of the third, the bill stating him to be dead insolvent. Lord Chancellor *Hardwicke*. The general rule is, where a debt is joint and several, that each of the debtors must be brought before the court, because they are entitled to each other's assistance in taking the account; and debtors are entitled to contribution where one pays more than another. On specialty debts heirs and executors must be parties, but where the obligors are only sureties, they are not necessary parties. 3 *Atk.* 406. 1746. *Madox v. Jackson.*

31. The widow and representative of *Newland* brought a bill for an account against *Sir George Champion*, the surviving partner of her husband; her brother, who was a creditor of her husband for 1000*l.*, also brought a bill against *Sir George Champion* for an account. These two causes were brought on together, and it was insisted that the second bill ought to be dismissed, for it would multiply suits if every creditor might not only bring his bill against the personal representative of the debtor, but also against every debtor of that debtor. *Per Lord Chancellor.* The general rule is plain, that a creditor of the testator or intestate need not make



any body a party but the personal representative. At the same time in this court, if there are any persons who have possessed the estate, or any debtors of the deceased, and any collusion between them and the representative, they may here make them parties and demand an account against them. And an account was decreed between the plaintiff in the second cause and Sir George Champion. 1 Ves. 105. 1748. *Newland v. Champion*. *Percock v. Monk*, *Ibid.* 31. *Atterson v. Mair*, 2 Ves. jun. 95. S. P.

32. An insolvent debtor is not a necessary party to a bill by a purchaser of his interest in stock against his assignee. 3 B. & Cb. Rep. 228. 1791. *Collet v. Wallaston*.

Heirs and  
Executors.

33. In cases of specialty debts heirs and executors must both be parties. 3 Atk. 406. 1746. *Madox v. Jackson*.

34. Where an estate has been for some length of time quietly enjoyed under a will, it is not necessary to make the heir a party to a bill by creditors against the devisees: but generally where lands are devised to pay debts, if creditors bring a bill to compel a sale, the heir is to be made a party; otherwise in case of a trust created by deed to pay debts. 3 P. Wms. 91, 92. 1730. *Harris v. Ingledew*.

*Where there is only an equitable charge on a copyhold, and the legal estate descends to the heir, it is necessary to make the heir a party, otherwise the legal estate of the copyhold could not be conveyed to a purchaser; but if the heir at law had, after the testator's death, conveyed away all the copyhold estate, then such grantee being capable of conveying to the purchaser, it might not be necessary to make the heir a party. Ibid, in notis.*

35. An heir at law need not be made a party to a bill brought by a devisee to redeem a mortgage, unless he claims to have the will established. 2 Ves. 431. 1752. *Lewis v. Nangle*. But deeds cannot be delivered out of court to a devisee, unless the heir is a party to the suit. 1 Ves. jun. 29. 1789. *Anon*. Nor can the execution of the trusts of will of real estate be decreed, unless he is before the court. 1 Ves. jun. 272. 1791. *Graham v. Graham*.

36. A. covenants for himself and his heirs, that a jointure house shall remain to the uses in the settlement. The jointress brings a bill against the heir for a performance. Defendant demurs, for that the executor ought to be a party; and allowed. 3 P. Wms. 331. 1734. *Knight v. Knight*.

*In a bill by a mortgagee against the heir of the mortgagor to foreclose, the executor of the mortgagor need not be a party. So note the diversity between the last case and this; for there the bill was to recover a satisfaction in damages for want of repairs, &c. and there the personal estate is the natural fund for that purpose; but here the bill was not to recover the debt, but only to bar the equity of redemption. Ibid, in notis.*

37. A bill of discovery of real assets may be brought against the heir in order to preserve a debt, without making an administrator of the personal estate a party; where you suggest that the representation is contesting in the ecclesiastical court, there a plea for want of parties would not be allowed. 2 Atk. 51. 1740. *Plunket v. Penfon*.

38. A father by his will appoints an executor *durante minore etate* of his daughter, and that she should be the executrix when she came of age; the daughter, turned of 21, is brought alone before

before the court, though it appears in the cause that the executor, *durante minore etate*, had collected in the greatest part of the personal estate; he ought also to be a party. 2 *Atk.* 121. 1740. *Glass v. Oxenham.*

39. Objection for want of parties upon the 3 *William & Mary*, c. 13. against fraudulent devises, that the heir at law must be before the court; and allowed. 2 *Atk.* 125. 1740. *Warren v. Starwell.*

40. Upon an information to apply money, given to a charity, to other uses than those specified by the will; where there is a residuary gift to trustees for other charitable uses, the trustees and the heir, though disinherited, are necessary parties. 2 *Bro. Ch. Rep.* 497. 1789. *Attorney-General v. Green.*

41. Bill by devisees in trust to sell for specific performance of an agreement to purchase: exception to the report in favour of the title, that the persons entitled to the purchase-money, subject to debts and legacies and other charges, were not parties to the suit. The Chancellor was of opinion that they were not necessary parties to the conveyance, but if they were, that their covenant ought to extend only to their own acts and those of the devisor, and not to a general warranty, without a special contract for it. 3 *Ves. jun.* 233. 1796. *Wakeman v. Dukes of Rutland.*

42. A marriage settlement having been made of certain lands on the husband for life, remainder to the wife for life, with divers remainders over; the present bill was brought by the husband to have the opinion of the court, Whether a certain parcel of land was intended to be included in the settlement? Objection, that the wife was not made a party, which was allowed, as, if the court should be of opinion against the husband, a decree against him would not bind the wife. 1 *Atk.* 290. 1737. *Herring v. Geo.*

Husband and  
Wife.

43. *J. S.* by his marriage articles, reserves to himself a power to dispose of the lands therein mentioned (and which are settled in strict settlement) as he should think proper, in case he settled other lands of the value of 100*l.* *per annum* to the same uses; there is issue of the marriage a daughter. *B.* without notice of this settlement, articed with *J. S.* for the purchase of these lands, but, before the time for completing the payment of the purchase-money, *B.* had notice of this settlement, and thereupon he refused to pay the residue. *J. S.* brought his bill in order to compel *B.* to complete his contract, suggesting that at the time this contract was entered into, he had settled other lands of the value of 100*l.* *per annum* to the uses in the original settlement. The wife and daughter ought to have been parties. *Barnard.* 371.

44. To a bill against a wife respecting her separate property, the husband is more a formal party than any thing else, for the plaintiff really goes against the wife respecting her separate estate. 1 *Ves. jun.* 277. 1791. *Lillia v. Airey.*

45. Where an impropriator's right does not come in question, he need not be a party to a bill for subtraction of tithes. 3 *Atk.* 500. 1747. *Carte v. Ball.*

Impropriator.

Incumbent.  
Incum-  
brance.

See *Vicar*.

46. Where a mortgagee assigns without the mortgagor's joining, the heir of the mortgagor, on preferring a bill to redeem, has no occasion to bring the original mortgagee before the court, for the assignee, as standing in his place, will be decreed to convey. 2 *Atk.* 39. 1740. *Hill v. Adams*.

47. Bill to redeem against the defendant, who had notice of the plaintiff's title, but bought of the *Marquis of Wharton*, who had no notice; the objection allowed for not bringing the representative of the marquis before the court, otherwise the defendant would be deprived of that defence. 2 *Atk.* 139. 1740. *Lowther v. Carlton*.

48. Bill of foreclosure against a tenant for life, and the first remainder-man in tail; the usual decree was made; the time for redemption being elapsed, the tenant in tail released the equity of redemption, so that the decree was never made absolute. Held binding on those in remainder, it being sufficient to make the first tenant in tail party to a bill of foreclosure. *Ambl.* 564. 1769. *Reynboldson v. Perkins*.

49. A share of *Covent Garden* playhouse having been mortgaged, the mortgagee assigned the mortgage to a trustee, in trust for three persons, who contributed equal proportions of the money; one of the three filed a bill to foreclose the equity of redemption. The court was of opinion that one could not foreclose without making the other two parties. 1 *Bro. Ch. Rep.* 368. 1784. *Lowe v. Morgan*.

50. In a bill by a second mortgagee to redeem the first mortgage, the mortgagor or his heirs must be parties. Where the heir is abroad the court cannot proceed. 2 *Bro. Ch. Rep.* 276. 1787. *Fell v. Brown*.

Joint-  
tenants.

See *Pleading*.

Joint-  
owner, &c.

51. It is not necessary to make one joint-owner a party to a bill against a factor, respecting the moiety belonging to the other joint-owner. 1 *Ves. jun.* 417. 1792. *Weymouth v. Boyer*.

52. Timber purchased for a colliery, before it was applied to the use of the colliery, some of the owners retired; and it was paid for by those only who remained; the former owners are not necessary parties to a suit by those who remained, against the vendor on account of that sale. 2 *Ves. jun.* 317. 1794. *Mossey v. Davis*.

53. One part-owner of a ship, cannot bring a bill on behalf of himself and the other part-owners, but they must be all parties. 2 *Bro. Ch. Rep.* 338. 1788. *Moffat v. Farquharson*.

Legatees and  
residuary  
Legatees.

54. Bill by some of the residuary legatees, on behalf of themselves and the other devisees; all the residuary devisees must be parties. 2 *Bro. Ch. Rep.* 365. 1791. *Parsons v. Neville*.

55. A residuary legatee need not be a party to a bill for a specific legacy. 1 *Ves. jun.* 313. 1791. *Wainwright v. Watterman*.

*Vide*

*Vide Vin. Abr. tit. Copyhold. (X. c).*

56. Bill does not lie against several tenants of a manor for quit rents. 1 *Bro. Ch. Rep.* 200. 1783. *Bouverie v. Prentice.*

Lord of the Manor.

*Vide Debtors, Pleading.*

57. *Per* Lord Chancellor.—It is not necessary, in every case of assignments, where all the equitable interest is assigned over, to make the person who has the legal interest a party; but if an obligee has assigned over the bond, and a presumption of its being satisfied arises from the great length of time, as in the present case, where the bond was given by Sir *James Harrington's* father in 1709, and assigned over in 1717, and no demand has been made in 22 years, till the bringing of this bill in 1739, by the assignee; the representative of the obligee should be a party. 2 *Ath.* 235. 1741. *Brace v. Harrington.*

Obligor.

Obligee.

58. The representative of the obligee, who was dead, ought to be a party in a bill for a *ne exeat regno* against the obligor. 3 *Bro. Ch. Rep.* 25. 1789. *May v. Fenwick.*

59. One owner of lands in a township may sue for himself and the other land owners to establish a contributory modus. *Anst.* 768. 36 G. 3. *Scarr v. Trinity Coll. Cambridge.*

Occupiers of land and land owners.

60. It was held not necessary to make the planters parties to a bill for specific performance of articles entered into in *England* between the proprietors of two provinces in *America* respecting their boundaries, the tenure of the planters being prescribed by the articles. 1 *Ves.* 450. 1750. *Penn v. Ld. Baltimore.*

61. Bill for an account and for the delivery of a strong box, which was in the custody of the defendant, and in which were found jewels, and a note in the following words: "Jewels belonging to the Duke of *Devonshire* in the hands of Mr. *Saville*," whose representative the plaintiff was, and in whose possession they had been ever since the year 1695 to the year 1745; not necessary that the duke's representative should be a party. 1 *Ves.* 101. 1748. *Saville v. Tankred.*

Pawnor.

62. A cause permitted to be heard without a necessary party, he being beyond sea. *Bunb.* 200. 1725. *Rogers v. Linton.*

Party beyond sea.

63. A. stated by books in evidence for defendant to be a merchant *abroad*, and one witness swearing he knew him late a merchant *abroad*, and no evidence of his return, he was sufficiently proved out of the jurisdiction, and the defendant was precluded from objecting, that he was not a party. 1 *Ves. jun.* 417. 1792. *Weymouth v. Boyer.*

64. A bill charges forgery in a lease, and prays to be relieved against it, but by way of inducement only mentions there were fraudulent circumstances attending this case, without making it a distinct charge from the forgery, or bringing the trustees, who were parties to the lease, and to whom the fraud is imputed, before the court, and for want of this, the defendant's counsel objected to the plaintiff's going on with the cause. Lord *Hardwicke* Chancellor, said, as there had been already a decretal order, and an issue to try the forgery, and brought on now on the equity re-

Party to a supplemental bill.

served; the only method to assist this case was, to let the cause stand over, and to allow the plaintiff, on paying the costs of the day, to file a supplemental bill, in which he may charge the fraud, and make the trustees parties. 3 *Atk.* 110. 1744. *Jones v. Jones.*

65. If the objection by the defendants in the original cause, for want of parties to the supplemental bill, is not made in the first instance, it is too late to do it when the cause comes on again, where it was put off only for want of formal parties, in order that the decree might be complete. 3 *Atk.* 217. 1745. *Jones v. Jones.*

Remainder-  
man.

66. Where there are ever so many contingent limitations of a trust, it is sufficient to bring the trustees before the court, together with him, in whom the first remainder is vested. 1 *Atk.* 590. 1738. *Hopkins v. Dare.*

67. A remainder man expectant on an estate tail, need not be a party to a bill, one end of which is to impeach a settlement, because such remainder-man is not regarded in equity, neither can he be bound. *Eq. Ca. Abr.* vol. 2. 166. *Anon.* pl. 8.

68. In a bill for execution of a trust by settling an estate on the several branches of a family, it is necessary to make the first person entitled to the inheritance a party, if in being. 2 *Ves.* 492. 1752. *Finch v. Finch.*

69. Bill to establish a custom, whereby the owners and occupiers of certain lands in the parish of *Tort Baldwin*, in the county of *Oxford*, were obliged to keep a bull and boar for the use of the parishioners. It was objected at the hearing, that a custom which binds the inheritance of the lands can never be established in a court of equity, without the owners of the inheritance are made parties, as *Queen's College*, (who were owners, &c.) ought to have been here; upon which objection the bill was dismissed. *Bunb.* 181. 1724. *Spendler v. Potter.*

70. If a remainder-man in tail brings a bill against tenants for life to have the title deeds brought into court, and there are annuitants upon the reversion, and others who have an interest in the trust term, they must all be parties. 3 *Atk.* 571. 1747. *Pyncent v. Pyncent.*

Tenant in  
tail.

71. Where a mortgagee has a plain redeemable interest, and makes several conveyances upon trust, to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, there it is not necessary that the plaintiff should trace out all the persons who have an interest in such trusts, to make them parties, but where the redemption depends upon equitable circumstances, and the plaintiff is not in the common case of redemption, and where the mortgagee in fee has made an absolute conveyance, with several limitations and remainders over, the decree cannot be complete without bringing at least the first tenant in tail before the court. 2 *Atk.* 237. 1741. *Kates v. Hambly.*

Vendor.

72. If an ancestor has agreed for the purchase of particular lands, and dies before it be completed, and the heir at law brings a bill

a bill against the devisees, who claim under the ancestor's will made before the purchase, the vendor must be a party, if his title be doubtful, otherwise if it be clear. 1 *Atk.* 572. 1738. *Green v. Smith.*

73. Bill by plaintiffs, as lessees of the rector of *Winterbourne*, Vicar. for a portion of great and small tithes in *Stoke Gifford*, being a neighbouring parish; the tenants and the lay impropriator, who claimed the great tithe in *Stoke Gifford* were made parties; but because the vicar of *Stoke Gifford*, who might be entitled to the small tithe, was not made a party, the bill was ordered to be dismissed; but, upon application, stood over with liberty to amend. *Bunb.* 115. 1722. *Baily v. Worral.*

74. Bill for tithes by the bishop and sequestrator during the incapacity of the incumbent, dismissed, the incumbent not being made a party. *Bunb.* 141. 1723. *Bishop of London v. Nicholls.*

75. Bill by a vicar, against a sequestrator for an account of the profits received during the vacation: it was objected, that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives. By the stat. 28 *Hen.* 8. the court thought the bishop should have been a party; by consent, the cause was referred to the bishop of the diocese. *Note.* It was said that a sequestrator could not alone bring a bill for the tithes. *Bunb.* 192. 1724. *Jones v. Barrett.*

76. The representatives of the undertakers for briefs, who are dead, need not be brought before the court, for they are each answerable the one for the other, and are to be considered as one body. 2 *Atk.* 162. 1741. *Ex parte Angel.* Undertakers for briefs.

### (C) Want of proper Parties. The Effect thereof. 16 *Vin.* 257.

1. A Bill is not dismissed for want of proper parties, but stands over on paying the costs of the day, that the plaintiff may have an opportunity of making proper parties. 4 *Bro. Par. Ca.* 122. 1733. *Green v. Poole.* 2 *Atk.* 15. 1737. *Anon.* 3 *Atk.* 111. 1744. *Jones v. Jones.*

2. If at the hearing the plaintiff waives the relief he prays against a particular person, the objection for want of his being a party will have no weight. 2 *Atk.* 296. *May* 1742. *Parulet v. Bishop of Lincoln.*

3. Exceptions may be taken for want of parties at the hearing of the cause, or the bill may be demurred to. 2 *Atk.* 510. 1742. *Darwent v. Walton.*

4. But it must be done at the opening of the proceedings, and before the merits are disclosed. 3 *Atk.* 111. 1744. *Jones v. Jones.*

5. If the objection by the defendants in the original cause, for want of parties to the supplemental, is not made in the first instance, it is too late when the cause comes on again, where it was put off for want of formal parties, in order that the decree might be complete. 3 *Atk.* 217. 1745. *Jones v. Jones.*

6. Where a cause stands over for want of making some defendants parties, you cannot proceed against any other, unless the plaintiff will submit to dismiss his bill as to those defendants who are improperly brought before the court. 3 *Atk.* 400. 1746. *Wicks v. Marshall.*

16 Vin. 257. (D) Who shall be said to be Party. When and by what praying Process.

WHOEVER comes in before a Master under a decree, is *quasi* a party to that suit, and if he brings a new bill, a plea that the former suit is still depending will be allowed. 3 *Atk.* 557. 1747. *Neve v. Weston.*

## [G]

## Paupers.

16 Vin. 259.

(B) In what Cases and how.

THE affidavit to ground his being admitted to sue *in forma pauperis* must be made by *himself*. 2 *Bro. Ch. Rep.* 272. 1787. *Wilkinson v. Belsher.*

16 Vin. 259.

(C) Favoured, indulged, punished, or restrained.

1. PLAINTIFFS suing *in forma pauperis* shall not amend by leaving out defendants without paying their costs. 2 *Bro. Ch. Rep.* 272. 1787. *Wilkinson v. Belsher.*

2. A pauper shall not dismiss his bill without costs. 3 *Bro. Ch. Rep.* 87. 1790. *Pearson v. Belsher.*

3. A pauper is liable to be committed for filing an improper bill. 4 *Ves. jun.* 630. 1799. *Pearson v. Belsher.*

4. On a motion to stay the plaintiff's proceedings as a *pauper*, till he paid costs in a former action, wherein he was nonsuited; it appeared that the nonsuit was upon a slip of the attorney's, and not upon the merits of the cause, which the defendant might have gone into notwithstanding, if he would. The court—This was not vexatious, and therefore refused to stay proceedings. *Winter v. Slow*, 2 *Stra.* 878.

5. *Per curiam*—It is settled in *C. B.*, and we rule it so here, that a *pauper* shall not pay costs for not going to trial as other plaintiffs do. But if the costs are taxed, we will prevent his being vexatious, by obliging him to pay them before he shall try the cause. *Noaks v. Watts*, 1 *Stra.* 420.

6. It was moved (on the authority of the above case of *Noaks v. Watts*) that the plaintiff, who was a pauper, might be restrained from going on to trial, till he paid costs for former notices. But the court thought that case did not put it on a right foot, and that it was absurd to make any rule about costs whilst the admission stood; and therefore ordered plaintiff to shew cause why he should not be dispaupered. And on affidavit of service made it absolute. *Taylor v. Lowe*, 2 *Stra.* 983.

7. After a nonsuit in trespass the court will stay the proceedings in a second action between the same parties for the same cause until the costs of the nonsuit are paid, notwithstanding the plaintiff be a prisoner at the time of bringing the second action, and sue *in forma pauperis*. *Weston v. Withers*, 2 *Term Rep.* 511.

8. The plaintiff sued as a pauper, and was nonsuited; after which he brought a second action, and recovered. And it was moved on behalf of the defendant, that the costs in the first action might be deducted out of the recovery in the second, but it was refused. *Butler v. Innes*, 2 *Stra.* 890.

9. A plaintiff pauper is not entitled to issue-money; and if he sign judgment because the defendant does not pay it, the court will set the judgment aside. 5 *Term Rep.* 509.

By a late  
rule of court

no judgment shall be signed for non-payment of issue-money; but the same shall remain to be taxed as part of the costs in the cause. 6 *Term Rep.* 477. R. M. 36 *Geo.* 3.—See *Rex v. Clarke*, 3 *Burr.* 7398. and *Rex v. Pearson*, 2 *Burr.* 1939.

**Pawn.**

(A) *What.* As to the Interest of Pawnee or Pawnor; 16 Vin. 283.  
*and how considered.*

1. **WHERE** money is generally lent upon a pledge it will not deprive the lender of his remedy against the person; but to do that there must be a special agreement to stand to the pledge only. *The South Sea Company v. Duncomb*. Trial at bar in *B. R.* 2 *Stra.* 919. 2 *Barnard.* 48. *S. C.*

2. The difference between bailing and pledging of goods is, that a pawnee hath a special property, and a bailee the custody only. *Hartop v. Hoare*, 3 *Atk.* 46.

3. The disposition of a pawn is quite variant from a sale, for a vendee can transfer the thing to any other, and trade is thereby promoted; but it is quite otherwise in the case of pawns, for they tend to stop the change of the property of the things that are pledged; and that is a sufficient difference to make pawning not fall



fall within the custom that a sale in market overt in an open shop in London binds the property of a stranger. *Id. ib.*

4. Admiral *Stewart* by will gave his plate to trustees for the use of his wife *durante viduitate*, requiring her to sign an inventory, which she did. She afterwards pawned them with the defendant and died. In trover by the plaintiffs, who claimed under the remainder-man, a special case was reserved. But the counsel for the defendant gave up the point as clear. *Hoare & al. v. Parker*, 2 Term Rep. 376.

5. The plaintiff, as assignee of the effects of Sir *S. Evance*, a bankrupt, brings his bill against the company to oblige them to suffer him to transfer the stock of Sir *S. E.* The company insist that Sir *S. E.* was their banker, and greatly indebted to them, and that upon the clause in the bankrupts' act, which directs the commissioners to state the accounts between mutual dealers, they shall be allowed to hold the stock, and account only for the balance, if any shall appear against them. And the Chancellor, *assessante Raymond et Price*, were of this opinion, and decreed accordingly. 1 *Str.* 645.

*Note.* But the reporter puts a *quære*. And in *Me-*

*Bonacchi et Royal Exchange Assurance Company*, 1 Eq. Co. Abr. 8. pl. 8. it is said that there was in this case an express by-law to subject the stock of each member to satisfy the debts they should owe to the company. And it was then held that a company has no right to hold the stock of a proprietor for money lent to him.

6. Trover by the captain of a ship against the owner for a parcel of elephants' teeth. The defendant had entered them, together with his own, at the custom-house, and paid the duty. It was insisted, that the plaintiff should shew a tender of the duty, otherwise the goods were in the nature of a pledge. But *Eyre C. J.* said, that would not justify defendant in keeping them, for he had his action for the money, and if he would shew what the duty came to, it might be deducted from the damages; which was done. *Stone v. Lingwood*, at *Guildhall, Mich.* 12 G. *Str.* 651.

#### 16 Vin. 264. (B) Redemption. At what Time; and on what Terms.

A Bill was brought by an assignee under a commission of bankruptcy for the re-delivery of jewels and plate pledged by the bankrupt to the defendant, who had also given a promissory note for the delivery over of those goods to the assignee, or the value of them, upon the assignee's paying him all that was due. By way of defence the statute of limitations was insisted upon, and also that this being a pledge the remedy was to bring trover, and not by a bill in equity. But Lord *Hardwicke C.* held, that the statute was no bar to this demand, for no time being given for redemption, the bankrupt had during life to redeem; that there were cases in which there might be a right to come into equity to redeem, and that there was a strong reason for it here; the plaintiff being an absolute stranger to what was due, had a right to come

come into equity to know it, in order to make a tender, which he cannot do without tendering the precise sum. *Kemp v. Westbrook*, 1 Ves. 278.

### (D) Redemption of Deeds, &c. pawned.

1. *C.* Having assigned a vessel (in consideration of a debt due) together with the policy of insurance upon it, to the plaintiff's testator, covenanted that he would keep up the insurance. The vessel being at sea, *C.* made the policy accordingly; but the broker, being his creditor, would not part with it, and *C.* consented that it should remain with him as a pledge for his debt. The assignees of *C.* (who became a bankrupt), having satisfied the broker, insisted that the broker, being the agent of *C.*, and having the policy in his custody, it was a leaving by the testator in the possession of the bankrupt within 21 Jac. 1. c. 19., and refused to deliver it up. But Lord Thurlow *C.* decreed for the plaintiff. *Falkner, Executor of Crowder, v. Case et al.* 1 Bro. Chan. Rep. 125.

2. A lease having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee brought his bill for a sale of the leasehold estate. The Lords Commissioners decreed accordingly; for this is not within the statute of frauds, s. 4. For the contract is executed, and the court has nothing to do but supply the legal formalities. *Russel v. Russel*, 1 Bro. Chan. Rep. 269.

In a note by the reporter, this case is said to have come on again, coram

Lord Thurlow *C.* who ordered the lease to be sold.

3. In *Featherstone v. Fenwick*, May 1784, and *Harford v. Carpenter*, 17 and 18 April 1785, Lord Thurlow *C.* held, that the deposit of deeds entitled the holder to have his lien effectuated by a mortgage, although there was no special agreement to assign; the deposit affording a presumption that such was the intent. 1 Bro. Chan. Rep. *ib. notis.*

### (E) Redemption. Where Goods are pawned by 16 Vin. 265. one that is not Owner.

**T**HOUGH a factor has power to sell, and thereby bind his principal, yet he cannot affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt. *Per Lee C. J.* 2 Str. 1178.

## Payment.

36 Vin. 280. (P) *Payment.* Devise or Settlement for Payment of Debts. How. *Pari passu.*

1. A Will begins, "As to all my worldly estate," my debts being first paid, I give, &c.; the real estate is liable to the debts, nothing being devised till the debts are paid. 3 P. Wms. 96. Hil. 1730. *Harris v. Ingledew.*

2. One by will charges all his worldly estate with debts, and dies seised of freehold and copyhold estates, which he particularly disposes of by the will; the copyhold, though not surrendered to the use of the will, shall yet be applied to the payment of the debts. *Ibid.*

3. If a man charges all his lands with the payment of his debts, and devises part to A. and other part to B., &c.; the creditors cannot be paid out of the lands till the Master has certified what the proportion is, which each devisee is to contribute: but if the Master certifies that the debts will exhaust the whole real estate, then the creditors may proceed against any one devisee for the whole. *Ibid.*

4. Money arising from the sale of lands devised to be sold for the payment of debts, is legal assets in the hands of the executor. Atk. 420. 1778. *Blatch v. Wilder.*

5. Before the marriage of Edward Joye with Mary Broughton, it was agreed that 300l., till it could be laid out in lands, should be settled in trust for Edward Joye for life, for Mary Broughton for life, and, in default of issue, to the use of such person, and for such estate, as she should by any deed direct or appoint, and for default of such appointment, to her right heirs for ever. Mary, by deed-poll appoints the 300l. to be paid to her husband, to be employed by him to such charitable uses, or other purposes, as he should think fit. Edward devises this 300l. to the defendants, in pursuance of his wife's directions. The 300l. considered as part of Edward's assets, and applied in payment of his debts. 1 Atk. 465. Nov. 1739. *Hinton v. Joye.*

6. The marshalling of assets by letting simple contract creditors come in the place of a specialty creditor, can only be where the specialty creditor had a remedy against the real and personal estate of the debtor deceased, whose assets are in question. 1 Vesf. 312. Nov. 1749. *Lacam v. Mertins.*

7. The court will go as far as it can to attain the payment of debts: real estate, where charged, is affected by equitable, as well as by other debts. 1 Vesf. 483 & 495. June 1750. *Afley v. Powis.*

8. Devise

8. Devise that all debts should be first paid and satisfied: customary lands surrendered in trust for several, and for the use of such as the testator should appoint, and devised in distinct parts from the rest, are subject to debts; the first disposition running over all. 2 Ves. 271. 1754. *Earl of Godolphin v. Penrick*.

9. The most liberal construction of wills is to be made for creditors. *Ibid* 272.

10. Additional legacy to A. charged on the real and personal estate, the other legacies not charged on the real estate: If A. exhausts the personal estate, the other legatees shall have satisfaction *pro tanto* out of the real. *Ambl*. 127. *Hanby v. Roberts*.

11. Equity of redemption of a leasehold estate held to be equitable assets. *Ambl*. 308. 1756. *Hartwell v. Chitters*.

12. The question, whether a reversion after several estates tail, falling in after the death of the reversioner, be assets to pay his debts, agitated, but not determined. 1 Bro. Ch. Ca. 240. *March* 1783. See *Frederick v. Ayncomb*, 1 Atk. 392.

13. An equity of redemption may be devised, granted, or entailed, and such entail may be barred by fine and recovery, and the person entitled to it is the owner of the land, and a mortgage in fee is considered as personal assets. 1 Atk. 605. *Hil*. 1737. *Casborne v. Scarfe*.

14. Admission of assets by the executor to one legatee, is an admission to all. 2 Atk. 3. *Easf*. 1737. *Cook v. Martyn*.

15. Where an executor is also a trustee for payment of debts, the assets shall be legal. 2 Atk. 50. *July*, 1740. *Lewin v. Okeley*.

16. *Cestui que trust* of a real estate made a mortgage upon it in fee, and devised the equity of redemption to his son and his heirs, subject to the payment of his debts, and died indebted by bond, and simple contract; as this was a mortgage of the whole inheritance, and nothing remaining in the mortgagor, the bond-creditor can have no preference, but must be paid *pari passu* with the other creditors. 2 Atk. 290. *April* 1742. *Plunket v. Penfon*.

17. When a plaintiff, especially a creditor, must come into equity for relief, the court will do equal justice to all creditors, without any distinction as to priority. *Ibid*.

18. After assets are discovered in equity, the plaintiff shall not be sent to law, but shall be decreed a satisfaction. 2 Atk. 363. *June*, 1742. *Rates v. Hambly*.

19. H. being seised in fee of an estate, borrowed money in 1724, gave a bond for it, and a mortgage in 1728. He devised the mortgaged estate and a freehold for three lives to his wife, and appointed her sole executrix. The question was, if the personal estate were not sufficient to pay the mortgage, whether the estate descended on the plaintiff should make up that deficiency, so that the estate devised to the wife might not be affected whilst there were real assets. Court of opinion that the wife had a right to have the devised estate exonerated out of the real estates descended. 2 Atk. 430. *June* 1744. *Galton v. Hanceck*.

20. If a personal estate is increased by any event after the testator's death, it is part of the residue, and will pass as such, and so will the interest of that residue, for that interest is assets. 2 Atk. 473. Dec. 1742. *Green v. Ekins*.

21. A. had power to charge a sum of money on land by deed or will, and executes it by a voluntary deed; the court in favour of the creditors of A. will consider it as assets. 3 Atk. 269. July 1745. *Pack v. Bathurst*.

22. Where the personal estate has been exhausted in payment of specialty creditors, the widow shall stand in their place, as to the amount of her paraphernalia upon the real assets of the heir at law. 3 Atk. 369. June 1746. *Snelson v. Corbet*.

23. The testator desires that all his debts may be discharged by his executors, adding, "I mean those only of my own contracting, not those heavier debts by my family," and gives his personal estate to his mother, whom he makes executrix, desiring her to pay all his just debts exactly: long after making the will the mother buys in mortgages charged on his estate by his ancestors, and the son covenants to pay the money. The personal estate is still exempted from the principal and interest due on these mortgages, which are still a charge on the real. 1 Ves. 51. Nov. 1747. *Leman v. Newnham*.

24. Devisee in trust for payment of debts mortgages the estate to one of the creditors: he shall not retain it for his former debt, but come in *pari passu*. 1 Ves. 215.

25. Sir R. W. reciting himself to be seised, subject to incumbrances, of an estate which was mortgaged, devised another estate for a term of twenty-one years in aid of his personal estate to pay bond, and book debts, and by a subsequent clause to pay all his debts: the personal estate, and the term shall exonerate the mortgaged estate. 1 Bro. Ch. Rep. 240. March 1783. *Marchionest Dewager of Tweedale v. Earl of Coventry*.

26. Devise of an estate for payment of debts takes it out of the statute against fraudulent devises. On a direction to pay out of the rents and profits, no sale, or mortgage can be made. 1 Bro. Ch. Rep. 311. Oct. 1783. *Lingard v. Earl of Derby*.

27. Devise to sell the residue, after payment of debts, and the money to be part of the personal estate, on a total insolvency, held to be equitable assets. 2 Bro. Ch. Rep. 94. 1786. *Batson v. Lindegreen*.

28. A sum of money being in court to be laid out in lands, which when purchased would be subject to the bond debts of the testator, the debts were decreed to be paid out of the fund in court. 3 Bro. Ch. Rep. 256. East. 1791. *Cattell v. Money*.

29. An equity of redemption is not equitable assets, at least as against judgment creditors, who have a right to redeem. 4 Ves. jun. 538. April 1799. *Sharpe v. Earl of Scarborough*.

(Q) What Debts to be paid by virtue of such 16 Vin. 282.  
Devise or Settlement.

ONE owes a debt of simple contract, six years past, whereby his debt is barred; after which the debtor by will charges his lands with the payment of all his debts, and dies; this debt is revived. 3 P. Wms. 84. *Jones v. Earl of Strafford*.

See *Limitation, Trust, &c.*

(R) Devise or Settlement for Payment of *Debts or* 16 Vin. 282.  
*Legacies*. Where they shall be paid *pari passu*.

1. *A.* By his will gives an estate for life to his wife, and in the latter part creates a trust term for payment of debts, to take place from the day of his death: the term, though subsequent, shall take place of the wife's estate for life, especially as it is a trust term for raising money. It is immaterial how a testator places the several devises in a will, because the whole must be construed together, so as to make it consistent. 1 Atk. 419. 1737. *Ridout v. Dowding*.

2. The rule as to marshalling assets on behalf of a legatee obtains only where it was proper to be done at the time when the legacy took place. 1 Atk. 486. *East*. 1738. *Prowse v. Abingdon*.

3. The plaintiff lent *A.* 500*l.* on note, on assurance that an aunt had left him 4000*l.* by will. *A.* died soon after, and his representatives refused to pay the 500*l.* as the legacy was directed to be laid out in land, and settled on *A.* in fee; the court could not let in a simple contract creditor upon money so devised. 2 Atk. 307. *June* 1742. *Trelawny v. Booth*.

4. As long as the fund exists upon which a legacy is charged, though it devolves upon the heir or executor, yet they take it subject to the charge. 2 Atk. 605. 1743. *Wills v. Wirley*.

5. *A.* agreed to purchase an estate of the plaintiffs for 1200*l.* but died before he had paid the whole purchase-money; *A.* by will, after giving 800*l.* legacy to his sister, devises the estate purchased, and all his personal estate, to *J. K.* and makes him executor; *J. K.* commits a *devisavit* and dies, and the purchased estate descends to *B. K.* his son. The court, to give the legatee a chance of being paid her legacy out of the personal assets, directs the plaintiff to take his satisfaction upon the purchased estate for the remainder of the purchase-money. 3 Atk. 272. *Feb.* 1745. *Pollenfen v. Moore*.

6. Assets not marshalled in favour of a charity. 1 Ves. 110. 1748. *Arnold v. Chapman*.

7. The real assets of *A.*, who took out administration to the executrix of *B.*, and administered *de bonis non* to *B.*, and who entered into the usual bonds to the ordinary, followed by *B.*'s legatees. 2 *Ves.* 368. 1751. *Ashley v. Bailie.*

8. Legatees are not entitled to stand in the place of specialty creditors against a devisee. *Amb.* 171. 1753. *Forrester v. Lord Leigh.*

9. By devise of real and personal, after payment of debts and legacies, the real estate is liable to debts contracted afterwards, and to legacies given by a codicil not attested according to the statute. *Amb.* 556. Nov. 1752. *Hannis v. Packer.*

10. *A.* by will appoints a certain person to sell his estates for payment of debts and legacies; bill by creditor and legatees, who are papists, to be paid; and held entitled. *Amb.* 767. Feb. 1776. *Foone v. Bleunt.*

11. The court refused to give a widow satisfaction out of the real estate devised and charged with debts, for her paraphernalia, which had been sold to pay her husband's debts. *Amb.* 6. May 1739. *Probert v. Clifford.*

12. Bill filed by a tutor for an annuity of 200*l.* for his own life against the executors of the pupil, who by his will charged his estate with all his debts, by bond, mortgage, or simple contract. The claim was supported by letters referring to an annuity, but no specific length of time named. Bill dismissed without costs. 1 *Bro. Ch. Rep.* 34. Hil. 1779. *Jameson v. Skipwith.*

13. Legacies, no fund being described, to be paid in the currency of the country where the will was made. 2 *Bro. Ch. Rep.* 38. 1786. *Pierson v. Garnet.*

14. Testator ordered his estate to be sold, and, after giving a legacy to his wife, directed the remainder to be vested in his executors for payment of debts; the money arising from the sale is equitable assets. 1 *Bro. Ch. Rep.* 135. East. 1782. *Newton v. Bennett.*

15. Where the testator by his will had ordered the trustees to possess themselves of his estates and substance, and to pay debts, it was held that this was a charge on the real estate, and that the assets should be marshalled for the legatees to let them in so far as the personal estate had paid towards the debts. 3 *Bro. Ch. Rep.* 347. August 1791. *Foster v. Cook.*

16. Legacy charged upon real estate, and payable at a future day, sinks as to the real estate, by the death of the legatee before the time of payment, and the assets cannot be marshalled. 3 *Ves. jun.* 135. June 1796. *Fearce v. Leman.*

17. Notwithstanding declarations of the testator to his executor, that he never meant to call for payment of a promissory note, it was held part of the assets, which were insufficient for the legacies, a charge on the real estate failing for want of proper attestation of the will. 4 *Ves. jun.* 6. 1798. *Byrn Godfrey.*

(T) What shall be liable to the Payment, or shall be 16Vin. 226.  
said charged.

1. ONE devises all his personal estate to his daughters, and all his real estate to trustees in trust to pay debts, &c. remainder to his daughter in tail, remainder over: the personal estate shall in the first place be all applied to pay the debts. 3 P. Wms. 324. Trin. 1734. *Hastewood v. Pope.*

2. A proviso in the will, that if the testator's personal estate, and house and lands at W. should not pay his debts, then his executors to raise the same out of his copyhold premises; the rents not being sufficient to discharge the testator's debts, these words will give the trustees a power to sell the copyhold lands to satisfy his intention of paying his debts. 1 Atk. 421. Nov. 1739. *Bateman v. Bateman.*

3. A man cannot, by any expression in his will, alter his estate and disappoint his creditors. 1 Atk. 465. 1739. *Hinton v. Toye.*

4. Where a real estate is expressly devised for payment of debts, the personal estate is exempted; but if the real is not sufficient, the personal must be applied. 2 Atk. 79. Nov. 1740. *Bicknee v. Page.*

5. Debts and legacies are by will directed to be raised by perception of rents and profits, or by leasing or mortgaging the land; this restrains it merely to a payment out of rents, and the court cannot decree a sale. 2 Atk. 105. Dec. 1740. *Ridout v. Earl of Plymouth.*

6. A man cannot, by any form of conveyance, raise a fee simple to his own right heirs, by the name of heirs, as a purchase, so as to prevent the reversion from being assets to satisfy the son's debts. 2 Atk. 57. O.R. 1740. *Godolphin v. Abingdon.*

7. *George Ward*, having power to charge his estate with 2000*l.* by his will gives 500*l.* apiece to his two sisters, and dies indebted to the plaintiffs; this 2000*l.* is the personal estate of *George Ward*, and liable to his debts. 2 Atk. 172. April 1741. *Bainston v. Ward.*

8. If a man makes no disposition of a reversion in fee, which he has power to dispose of, yet it shall be assets. *Ibid.*

9. *Thomas Delahay*, on his marriage, settled his estate on himself for life, on his wife for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to himself in fee. A son is born; the father dies indebted by bond; the son afterwards dies without issue, but by his will devises the estate to the defendant in fee: the reversion being come into possession, was held assets to pay the father's debts. 2 Atk. 204. Trin. 1741. *Kinnaston v. Clark.*

10. Though a real estate be devised to be sold, yet if a testator has done nothing to exempt the personal estate, it shall be  
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## Payment.

primarily liable; the rule is, the personal estate shall be first applied, unless there be express words, or a plain intention of the testator to exempt it, or to give it as a specific legacy. 2 *Atk.* 624. July 1743. *Walker v. Jackson.*

11. A fire engine, set up for the benefit of a colliery by a tenant for life, shall be considered as part of his personal estate, and go to the executor for the increase of assets in favour of creditors. 3 *Atk.* 13. Dec. 1743. *Lawton v. Lawton.*

12. Where a testator charges all his estates for payment of his debts, the devisee of a particular one must take subject to that charge. 3 *Atk.* 101. 1744. *Clark v. Sewel.*

13. A. devises to Sir J. B. his heir *Clifton* lands, he paying all debts and legacies charged on these lands, and after his decease to his nephew. Sir J. B. as tenant for life, is obliged to keep down the interest, if the principal is not discharged; but if it be, he is to pay one third and the reversioner two thirds. 3 *Atk.* 201. 1744. *Bridgeman v. Dove.*

14. Provisions in wills for payment of debts relate to the time of the testator's death: the words, "all the debts which I have contracted" must be construed, shall contract. *Ibid.*

15. The personal estate is liable to pay the debts, unless there is a special exemption of it. *Ibid.*

16. An advowson in fee in gross is assets by descent to satisfy bond creditors. An estate *pur auter vie*, though it is devised, will be liable to debts by specialty to contribute in a course of administration. 3 *Atk.* 460. March 1746. *Westfailing v. Westfailing.*

17. Where a man takes an estate as executor, it is assets, for as an executor he can take nothing without doing so. As before the statute of frauds, granting an estate *pur auter vie* to A. his executors, &c. would have made it assets: devising it them makes it equally so. *Ibid.*

18. Assets, descended on the heir at law, must be applied to the payment of debts before the lands can be charged, which are specifically devised. 3 *Atk.* 556. August 1747. *Powis v. Corbet.*

19. The executor of a bond creditor of Sir W. F.'s brings a bill for an account of his personal estate, and if that falls short of satisfying the debts, prays that a sufficient part of the real estate may be sold. The real estate never having been assets of Sir W. F., the lands comprised in the settlement made after his marriage, are not liable to his debts by specialty, for they are not specific liens upon the estate. 3 *Atk.* 631. March 1747. *Brown v. Danton.*

20. Where a legacy is charged on real estate, the personal is not to be applied in aid. 1 *Ves.* 482. 1750. *Amsbury v. Brown.*

21. Bequest of 100*l.* to a daughter, to be paid by the executor within a month after the death of the widow, to whom the real estate was devised for life, and afterwards to the son, the executor, in fee; two trustees or overseers being appointed to see the will performed:

performed: on a deficiency of assets the real estate shall be charged with the 100*l.* 1 *Ves.* 499. *July* 1750. *Lypet v. Carter.*

22. A charge by the will of the whole real estate in aid of the personal, for debts and legacies, is not restrained by a subsequent devise of a particular part for that intent, without negative words for that purpose. 2 *Ves.* 568. *August* 1754. *Ellison v. Airey.*

23. Devise in trust to pay debts is out of the statute against fraudulent devises. 2 *Ves.* 590. 1754. *Earl of Bath v. Earl of Bradford.*

24. Personal estate held not exempt from debts and legacies, by a devise of a competent part of real estate to be sold to pay them. *Ambl.* 33. 1744. *Lord Inchiquin v. French.*

25. Legatees are not entitled to stand in the place of specialty creditors against a devisee. *Ambl.* 171. 1753. *Forrester v. Lord Leigh.*

26. A. devises the residue of his real estate to be sold for payment of debts, and the surplus money he gives to nine persons; the residue of his personal he gives to his sister, and makes her executrix: held she took the personal exempt from debts. *Ambl.* 581. *Mich.* 1716. *Hayford v. Benlows.*

27. Devise of the remainder of effects, mortgages, bonds, &c. to charity, the court ordered the mortgage money to be first applied to pay debts. *Ambl.* 635. *Dec.* 1766. *Attorney-General v. Caldwell.*

28. The testator charges his real estate, which was subject to a mortgage contracted by his ancestor, and also all his personal estate, with his debts and legacies. The mortgage shall be borne by the estate originally liable, not paid out of his estates, and the executrix, having paid it out of the personal estate, shall be repaid the money. 1 *Bro. Ch. Rep.* 58. *Trin.* 1779. *Lawson v. Hudson.*

29. A legacy of 100*l.* out of the freehold and copyhold estates, also to be borne by that fund, and not paid out of the personal estate. *Ibid.*

30. In order to exonerate the personal estate from the payment of debts and legacies, it is necessary not merely to charge the real estate, but the will must direct the application of the personal estate. 1 *Bro. Ch. Rep.* 144. *Eost.* 1782. *Samwell v. Wake.*

31. Debts being charged by will on all testator's worldly estates; copyhold lands are liable, as well as freehold. 1 *Bro. Ch. Rep.* 273. 1783. *Coombes v. Gibson.*

32. Notwithstanding the testator charges a term for payment of debts, a leasehold estate purchased by him subject to a mortgage, shall bear the burthen of that mortgage, it not being properly the debt of the testator. 1 *Bro. Ch. Rep.* 454. 1785. *Duke of Ancaster v. Meyer.*

33. The personal estate shall not exonerate the real of a debt not contracted by the party. 2 *Bro. Ch. Rep.* 57. 1780. *Earl of Tankerville v. Fawcett.*

## Payment.

34. Estate devised to be sold for payment of debts, decreed so to be, without express words to exonerate the personal. 2 Bro. Ch. Rep. 60. 1786. *Webb v. Jones*.

35. A. purchased an estate subject to a mortgage; the personal estate shall not exonerate the real of the mortgage debt, though the purchaser has given a fresh security. 2 Bro. Ch. Rep. 101. 152. *Tweddell v. Tweddell*.

36. Although generally a descended estate shall be applied in exoneration of a devised estate, though under a charge for payment of debts, yet it shall not be so if the devised estate be expressly pointed out in aid of another fund provided for that purpose. 2 Bro. Ch. Rep. 257. Nov. 1787. *Donne v. Lewis*.

37. The personal estate, given to the next of kin, must be applied in discharge of the testator's mortgages not being expressly exempted, although it will be thereby exhausted. 2 Bro. Ch. Rep. 273. March 1787. *Philips v. Philips*.

38. There being a provision in a settlement of 5000l. for a younger child at 21, the father by will added 5000l. more, and charged all on a residuary real fund, which he had also made liable to debts and legacies in aid of his personal estate; the charged estate shall not be exonerated by the personal. 2 Bro. Ch. Rep. 316. March 1748. *Ward v. Lord Dudley*.

39. Leasehold estates specifically devised shall be applied in payment of debts before copyhold devised for that purpose, but unsundered. 2 Bro. Ch. Rep. 325. April 1788. *Bixley v. Ealing*.

40. Estates charged by will with the payment of debts ordered to be sold if necessary; the heir at law being in the *East Indies*, and the devisee insane. 2 Bro. Ch. Rep. 399. Dec. 1788. *Williams v. Whingate*,

41. Under a general charge for payment of debts, where the testator had freehold and copyhold estates, and sold all his freehold in his lifetime, the copyhold were held liable. 3 Bro. Ch. Rep. 257. East. 1791. *Kentish v. Kentish*.

42. Testator having two estates on mortgage, orders the debt upon the one to be paid out of his personal estate, and charges the other upon the mortgaged premises, and gives the residue of his personal estate to persons, by whose death in his lifetime it lapses; the mortgage debt charged upon the mortgaged premises shall be paid out of the personalty; for though he exonerated the personal estate for the legatees, *non constat*, he meant so to do for the next of kin. 3 Bro. Ch. Rep. 322. August 1791. *Hale v. Cox*.

43. Testator by his will ordered the trustees to possess themselves of his estates and substance, and to pay debts. This is a charge of the debts on the real estate. 3 Bro. Ch. Rep. 347. August 1791. *Foster v. Cooke*.

44. Money having been ordered to be paid to the husband in right of his wife, and he dying before payment, it was held a vested interest, and payable to his executor. 3 Bro. Ch. Rep. 362. August 1791. *Heygate v. Annesley*.

45. Devise

45. Devise of copyhold subject to a mortgage, not sufficient to exonerate the personal estate from the payment of the mortgage money. 3 *Bro. Ch. Rep.* 545. *East.* 1792. *Astley v. Earl of Tankerville.*

46. *A.* being master of both funds, charges a debt, which was personal, on the real estate; his heir shall not have it exonerated by the personal estate. 4 *Bro. Ch. Rep.* 199. *Hil.* 1793. *Hamilton v. Worley.*

47. *After paying debts* amounts to a charge for debts, for which very little is sufficient, the court leaning that way. 1 *Ves. jun.* 440. 1792. *Ridney v. Coussmaker.*

48. Though a general charge of debts upon a devised estate will not prevent the previous application of an estate descended, yet if the devised estate is selected, and appropriated to the debts, it is liable before the estate descended: but this arrangement does not bind the creditor. 3 *Ves. jun.* 114. *July* 1796. *Manning v. Spooner.*

49. The order of application of debts: 1st, the personal estate, unless exempted expressly; or by plain implication; 2dly, estates devised for the particular purpose of paying debts; 3dly, estates descended; 4thly, estates devised. 3 *Ves. jun.* 117. *July* 1796. *Manning v. Spooner.*

50. Real estate: devised held liable to simple contract debts under a direction in the beginning of the will, that debts and funeral expences shall first be paid: that which descended to the heir by the failure of the devise to be first applied. 3 *Ves. jun.* 545. *August* 1797. *Williams v. Chitty.*

51. Devise after payment of debts; the lands are charged. 3 *Ves. jun.* 738. *May* 1798. *Shallcross v. Finden.*

52. Specific disposition by will, subject to annuities and legacies, held auxiliary only; the general personal estate to be applied in the first instance. 4 *Ves. jun.* 76. *July* 1798. *Halsford v. Wood.*

53. To exempt the personal estate from the payment of the debts, the will must afford a necessary implication, viz. that inference that leaves no doubt upon the mind of the judge. 5 *Ves. jun.* 540. *July* 1800. *Hartley v. Hurl.*

54. Testatrix after giving an annuity and legacies, devised her real estate subject to the said annuity and legacies, and her debts and funeral and testamentary expences; and the debts of her late brother. The assets were marshalled in favour of a legatee by a codicil. 4 *Ves. jun.* 769. 1799. *Norman v. Morrell.*

55. The personal estate being simply sufficient for the debts, though not equal to the discharge of the legacies in full, and the real estate being devised, the court would not, under a direction to the executors to pay the debts and funeral expences as soon as conveniently might be, marshal the assets in favour of the legatees. 5 *Ves. jun.* 359. *March* 1800. *Keeling v. Brown.*

See *Charge, Condition, Tender, Trial, Assets, Devise*, and other proper titles.

## Penalty.

26 Vin. 307. (A) Penalty of Bonds, &c. *Relieved or enlarged.*  
And what shall be said a Penalty.

1. THE bill was for relief against a judgment on a bond, in which the plaintiff was jointly bound with his son, in the penalty of 100*l.*, that the son should not commit any trespass in the Duke of Beaufort's royalty, by *shooting, hunting, fishing, &c.* except with the licence of the gamekeeper, or in company with a qualified person: the son having caught two flounders with an angle rod, the bond was put in suit, and judgment for the penalty: the gamekeeper's brother-in-law, and a servant of the duke's, asked the plaintiff's son to angle with them, when he caught the flounders; and the verdict was found merely on their evidence. Lord Hardwicke, Chancellor, decreed the plaintiff should be relieved against the verdict, and that the duke should refund the 100*l.* recovered on the bond, and the 40*l.* damages. 2 *Atk.* 190. 1741. *Roy v. Duke of Beaufort.*

2. A bond given by plaintiff to defendant, who was a hair merchant, as a security for his service and behaviour in *Flanders* as an agent for buying hair; and as a security for his performance of the agreement he deposited 100*l.* in defendant's hands. He bought only 5*l.* worth of hair, and returned to *England* before the time agreed. This penalty cannot be decreed here, *because this is a bond for service only*, and different from a *nomine nane* in leases to prevent a tenant from ploughing. 3 *Atk.* 395. 1746. *Benfon v. Gibson.*

3. Where a person is guilty of a breach of a bond given as a security not to defraud the revenue, this court will not relieve against it, because it is considered in law as a crime. *Ibid.*

4. The court in this case can only direct an action at law upon a *quantum damnificatus* to try how far the defendant has been damnified. *Ibid.*

5. On marriage the two fathers agree to settle lands. One does so: the other gives a bond of 600*l.* with 1200*l.* penalty, if he does not, he has not election afterwards to forfeit the 600*l.* or settle, the settlement being the primary agreement, and the 600*l.* only a penalty for further security. 2 *Ves.* 528. 1754. *Chilliner v. Chilener.*

6. in a lease of lands renewable for ever, the lessee covenants, that he and his heirs shall, with all their family, live on the demised premises during the continuance of that and every other lease; and that whenever he or they shall fail so to do, an additional

tional rent shall become payable, with the usual remedies of distress and entry to compel the payment thereof. The reasonableness of this covenant is properly triable at law, and a court of equity ought not to interpose or give relief against it. 6 Bro. P. C. 417. 1770. *Ponsonby v. Adams*.

7. A lease covenants not to plough up any of the ancient meadow or pasture ground, and if he does to pay an additional yearly rent of 5*l.* an acre. This increased rent is not to be considered as a penalty, but as a liquidated satisfaction, fixed and agreed upon by the parties. And therefore upon an action brought for recovering it, a court of equity ought not to interpose, or give any relief. 6 Bro. P. C. 470. 1772. *Rolfe v. Peterfon*.

8. Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery, and an issue *quantum damnificatus* to try the damages. 1 Bro. Ch. Rep. 418. 1784. *Sloman v. Walter*. See *Hardy v. Martin*. 1783. S. P. *in notis*.

9. Upon an information and verdict against several persons, for obstructing a custom-house officer contrary to the statute 18 Geo. 1. c. 18. s. 25. each defendant is separately liable to the penalty imposed by the act. For where an offence created or made penal by statute, is in its nature single, one single penalty only can be recovered, although several join in committing it; but if the offence is in its nature several, each offender is separately liable to the penalty. *Rex v. Clarke*, Cowp. 610.

10. A person can commit but one offence on the same day by exercising his ordinary calling on a Sunday, contrary to the statute 29 Car. 2. c. 7. And if a justice of peace proceed to convict him in more than one penalty for the same day, it is an excess of jurisdiction, for which an action will lie before the convictions are quashed. *Crepps v. Durden*, Cowp. 640.

For more of Penalty in general see *Conditions, Covenant, Obligations*, and other proper titles.

## Perjury.

[G]

### (A) At the Common Law.

16 Vin. 307.

1. AN action will lie for a *suppressio veri* in a return to a mandamus, as well as for an *allegatio falsi*. *The King v. Lyme Regis*, 1 Dougl. 156.

2. In *Miller's case*, 3 Wils. 427. 2 Bl. Rep. 881. Lord C. J. De Grey said, it was a mistake mankind had fallen into, that a

B b 4

person

## Perjury.

person cannot be convicted of perjury who swears that he *thinks* or *believes* a fact to be true, for that he certainly may, and it only renders the proof of it more difficult. And in the case of *The King v. Pedley*, B. R. Trin. term 1784, this opinion was confirmed by Lord Mansfield. *Cases in Cr. Law*, 269. This question was also agitated in the Common Pleas, Mich. term 1780, by Mr. Serjt. Walker, when Lord Loughborough and all the other judges were unanimous, that *belief* was to be considered as an absolute term, and that an indictment might be supported upon it.

16 Vin. 311. (B) Punishable. How. At Common Law, and by Statute.

1. IF the defendant perjure himself in his answer in Chancery, the Exchequer-chamber, or the like, he is not punishable by the stat. 5 *Eliz.*, for it extendeth but to witnesses: but he is punishable for the same by indictment at common law. 2 *Burr.* 1189, per Lord Mansfield.

2. By 31 *Geo. 2. c. 10. s. 24.* to take a false oath in order to obtain letters of administration to a seaman's effects is a capital offence.

3. Prosecutions upon the stat. 5 *Eliz. c. 9.* being more difficult than by indictment at common law, are very seldom brought, especially at the sessions: and at common law justices of the peace have no jurisdiction over the offence. 2 *Hawk. c. 8. s. 38. Stra.* 1088. The safer and most usual mode therefore is by indictment at the assizes or in the King's Bench. 3 *Burn*, 294.

16 Vin. 313. (C) Punishable. In respect of the Court or Persons, before whom.

1. IN the case of *The King v. Alford*, summer assizes for Somerset 1776, the defendant was indicted for perjury in a cause tried at the assizes before Mr. Justice Willes. The caption of the indictment recited the names of the judges who were in the commission, and charged, "That at the said trial before the Hon. Edward Willes, one of the justices aforesaid, the defendant took his corporal oath, &c. he the said Ed. Willes, then and there having competent authority to administer an oath to the defendant in that behalf." The prisoner was found guilty. But Mr. Baron Eyre, who tried the cause, doubted of the authority of one commissioner to administer the oath; the record of *nisi prius* which was read in evidence stating, in the usual form, that the trial was before both the judges; and therefore another doubt arose, whether the evidence maintained the indictment. On reference of the first Hil. term 1777, the judges were unanimous that either of the judges may administer the oath; consequently there was no variance, and the conviction good. *Cases in Cr. Law*, 179.

2. *Qu.*

2. *Qu.* Whether a *false oath*, taken in Doctors Commons for the purpose of obtaining a *marriage licence*, is *perjury*. *Alexander's case, Cas. in Cr. Law, 74.*

3. *Qu.* If any magistrate is justifiable in taking a voluntary affidavit in any extrajudicial matter. *Vide 15 Geo. 3. c. 39. 3 Burn, 244.*

4. Justices of assize (sitting the court or within 24 hours after) may order a witness to be prosecuted for perjury, and assign counsel; and the prosecution shall be without tax, duty, or fee. By stat. 23 Geo. 2. c. 11.

(E) Punishable. In respect of its being a Thing 16 Vin. 315.  
material or not to the Issue.

1. IT is not necessary that it appear to what degree the point in which a man is perjured was material to the issue; for if it is but circumstantially material, it will be perjury. 1 *Lord Raymond, 258.*

2. Much less is it necessary that the evidence be sufficient for the plaintiff to recover upon; for in the nature of the thing an evidence may be very material, and yet it may not be full enough to prove directly the point in question. 2 *Ld. Raym. 889.*

3. And it is incumbent on the prosecutor to prove the materiality of the perjury.

(I) Actions and Pleadings.

16 Vin. 321.

1. IN an indictment for perjury committed at an Admiralty Session, where the commission was directed to *A. B.* and *C.* and others not named, of whom *A. B.* and *C.* were, among others, *to be one*; the court will take it to mean, that if either of the persons named of the *quorum* were present it would be sufficient, stating that at such a court *J. K.* was in due form of law tried upon a certain indictment then and there depending against him for murder; and that at and upon the said trial it then and there became and was a material question, whether, &c. are sufficient averments that the perjury was committed on the trial of *J. K.* for the murder; and that the question on which the perjury was assigned was material at the trial. *Rex v. Dowlin, 5 Term Rep. 311.*

2. An indictment for perjury assigned on an affidavit sworn before the court, need not state, nor is it necessary to prove, that the affidavit was filed of record, or exhibited to the court or in any manner used by the party. *Rex v. Cropley, 7 Term Rep. 311.*

3. Perjury may be assigned upon the affidavit of an attorney of the court, made in answer to a charge exhibited against him in a summary way for having in his possession blank pieces of paper with affidavit stamps and the signatures of a Master Extraordinary in Chancery, and another person at the bottom of the papers. *Ibid.*

4. It



4. It is no objection to such an indictment that it is not stated where the court was holden, where the original application was made, or when the rule was made, calling on the defendant to answer the charge, a sufficient inducement being laid to the fact of taking the false oath. *Ibid.*

5. To found an indictment for perjury, the requisite circumstances are these; the oath must be taken in a judicial proceeding, before a competent jurisdiction, and it must be material to the question depending, and false. *Rex v. Aylett*, 1 Term Rep. 69.

6. In the indictment there must be an allegation of time and place, which are sometimes material and necessary to be laid with precision and sometimes not. *Ibid.*

7. Where time is not material, it need not be positively averred, and if under a *vide licet*, may be rejected. *Ibid.* 70. (1).

8. It is not necessary to set forth in an indictment for perjury so much of the proceedings of the former trial as will shew the materiality of the question on which the perjury is assigned, it is sufficient to allege generally that the particular question became a material question. 5 Term Rep. 318. *Rex v. Dowlin*.

9. By the 23 G. 2. c. 11. The prosecutor need only set forth in the indictment the substance of the offence charged, and by what court, and before whom the oath was taken, (averring such court, &c. to have competent authority to administer the same,) and without setting forth the commission or authority of the court, &c.

10. But where the prosecutor in perjury undertakes to set out in the indictment more of the proceedings than he need under the stat. 22 G. 2. c. 11. he must set them forth correctly. 5 Term Rep. 317.

11. In an indictment for perjury at common law, the words "falsely, maliciously, wickedly, and corruptly," imply "wilfully." But on the 5 Eliz. c. 9. it must be expressly laid to have been wilfully committed. *Cox's case*, Cr. Cases, 82.

12. An indictment for perjury, laying the offence to have been committed "at the Guildhall of the city of London," is bad, for the venue must be laid in some parish or ward. *Harris's case*, 2 Cr. Ca. 928.

13. Perjury committed at the Old Bailey, on a trial before a Middlesex jury, is laid in and tried by a jury of the city of London. *Dougl.* 794.

14. On a conviction for perjury in an affidavit, exception was taken, that there appeared a material variance between the indictment and the affidavit; for in the affidavit the defendant swore that "he understood, and believed," &c. whereas the assignment of the perjury in the indictment was, that "he undertood, and believed," &c. omitting the letter *f*: when, per Lord Mansfield, "The true distinction seems to be taken in the case of *The Queen v. Drake*, 2 Salk. 660. which is this, that where the omission "or addition of a letter does not change the word, so as to make "it another word, the variance is not material; in the present "case the omission of the letter *f* does not change the word, and

"therefore

“therefore the jury were right in reading it understood.” *Rex v. Beach*, 1 *Cowp.* 229.

15. Several cannot be joined in one indictment for perjury, it being a separate act in each. *Rex v. Philips*, 2 *Stra.* 921.

(K) Proof.

16 Vin. 326.

1. ON an indictment for perjury in an answer in *Chancery*, it is sufficient to prove the *jurat*, and that the name subscribed is the hand-writing of the defendant. *Morris's case*, 1 *Cr. Cases*, 60. 2 *Burr.* 1189. 1 *Show.* 397.

2. On the statute 31 G. 2. c. 10. s. 24. for taking a false oath to obtain administration to a seaman, in order to receive his wages, it is necessary to prove, directly and positively, that it was the prisoner who took the oath. *Rex v. Brady, Cases in Cr. Law.* 368.

3. On the trial the oath will be taken as true till it be disproved; and therefore to convict a man of perjury, a probable, credible witness is not enough, for the evidence must be strong, clear, and more numerous on the part of the prosecution than the evidence on the other side. Therefore the law will not permit a man to be convicted of perjury, unless there are two witnesses at least. *Naylock's case. Old Bailey*, 1786.

4. Nor shall the party prejudiced by the perjury be admitted as a witness to prove it on an indictment on the statute, because the statute gives him ten pounds; but in an indictment for perjury at common law, the party injured may be a witness. 2 *Hawk.* 433.

5. In perjury on an affidavit before a commissioner, his authority need not be proved. *Buller's Ni. Pri.* 238. 1 *Show.* 397. 1 *Dougl.* 151. 1 *Term Rep.* 69.

6. On an indictment for perjury a copy of an answer in *Chancery* may be offered to, and be sufficient to warrant the grand jury to find the bill, but on the trial the original must be produced, and positive proof given that the defendant was sworn to it. *Bull. Ni. Pri.* 239.

7. On an indictment for perjury against a witness for what he swore at the trial, the *posse* is good evidence that there was a trial, so as to introduce the words spoken, on which the perjury is assigned. 2 *Esp. Ni. Pri.* 749.

8. In perjury, the *capias*, warrant, and affidavit, are good evidence that a cause was depending. 1 *Show.* 397.

9. It is material for the prosecutor of an indictment for perjury to prove what is alleged in the indictment, viz. that the facts that were the subject of such indictment were material to the cause upon the trial, on which the perjury was supposed to be committed. *H. B. Trials for 1783 & 1784*, p. 305. *Vide James's case, O. B.* 1784. No. 228.

## Perjury.

10. *Per Lord Mansfield.* A conviction upon a charge of perjury is not sufficient to disqualify a man to be a witness, unless followed by a judgment: I know of no case where a conviction alone has been an objection, because upon a motion in arrest of judgment it may be quashed. 1 Cowp. 3.

11. *Per curiam.* "In the crime of perjury the law requires two witnesses to convict, even on a distinct assignment of perjury: and the law does not leave it to the jury to determine whether they will believe one witness or the other, where there is but one each way, because the person indicted for perjury has already sworn one way, and if there is but one witness that swears the other way, the law will not suffer the person indicted to be convicted." *Ledwick's case, O. B. 1788. Vide Rex v. Broughton, 2 Stra. 1228.*

12. In an indictment for perjury, Lord Kenyon C. J. held, that the defendant in the original action, against whom the verdict went, was an incompetent witness, he not having paid the debt and costs. *Rex v. Eden, 1 Espinasse's Rep. 97.*

## [ G ]

16 Vm. 336.

## Personating.

1. BY 4 & 5 Will. & Mary, c. 4. Whoever shall personate another before commissioners authorized to take bail, so as the personated may become liable, shall be guilty of felony. See also 21 Jac. 1. c. 26.

2. It seems that if bail be put in in the names of persons who have no existence, the offender cannot be prosecuted upon the stat. 21 Jac. 1. c. 26. in having personated bail, but the court may order him to be set on the pillory for the misdemeanor. *Anon. 1 Stra. 384.*

3. By 8 G. 1. c. 22. 9 G. 1. c. 12. 31 G. 2. c. 22. and 4 G. 3. c. 25. Whoever shall personate a proprietor of any of the public stocks or funds, thereby endeavouring to receive any dividend or annuity of such proprietor, as if he were the true proprietor, or who shall assist or aid therein, shall suffer death without benefit of clergy.

4. It has been determined on the stat. 33 G. 3. c. 30. that obtaining and indorsing a dividend warrant at the bank of England, in the name of a stock holder, is personating a proprietor, and thereby endeavouring to receive the dividend, although no attempt whatever is made to receive the money at the pay-office. *Parr's case, Cas. in C. L. 487.*

5. By 31 G. 2. c. 10. Whoever shall personate the name or character of any seaman, or other person entitled to wages, or other

Other monies for services on board any of the king's ships, or the executor, administrator, wife, relation, or creditor of such person, in order to receive the monies so due to him, shall suffer death without benefit of clergy.

## Petitions in Chancery.

(B) *What may be done upon a Petition without a Bill.* 16Vin. 337.

**A** Decree gained by fraud may be set aside by petition, as well as a judgment at law by a motion. 3 *P. Wms.* 111. 1731. *Sheldon v. Fortescue Aland.* *Sed Vide Mussel v. Morgan*, 3 *Bro. Ch. Rep.* 74. *contra.*

(C) *What is to be done in case an Order is made upon the Petition.* 16Vin. 338.

1. **T**HE court of Chancery, upon petition, may allow maintenance for an infant where no cause is depending. 2 *Atk.* 315. 1742. *Ex parte Whitfield.* See also 2 *Atk. ante* 14. 1737. *Mellish v. De Costa*, and 3 *Bro. Ch. Rep.* 88. 1790. *Ex parte Kent.*

2. A guardian to an infant may be appointed, on petition, though no cause depending. 3 *Atk.* 813. 1754. *Ex parte Birchell.*

3. Petition to confirm the Master's report of maintenance and for costs, which the court granted, though no suit was depending. *Ambl.* 446. 1752. *Ex parte Thomas.*

4. Guardian may be appointed and maintenance allowed, upon petition, without suit. 3 *Bro. Ch. Rep.* 500. 1792. *Ex parte Salter.*

5. Petition by assignees of a bankrupt partnership for an order upon a mortgagee, whose title was affected by the bankruptcy, to deliver up the title deeds, and all deeds relating to this estate, but the petition was dismissed. 1 *Ves. jun.* 160. 1790. *Ex parte Poole.*

6. Timber on a lunatic's estate was cut and sold under an order of court, and the produce paid into the bank; on petition, the court refused to give the produce either to the heir or next of kin, without a bill, on account of the difficulty of reversing an order made upon petition. 1 *Ves. jun.* 453. 1792. *Ex parte Bromfield.*

## Piscary.

16 Vin. 354.

### (B) In what Place.

1. **I**N rivers not navigable the proprietors of the land have the right of fishery on their respective sides; and it generally extends *ad filum medium aque*.

2. But in navigable rivers the proprietors of the land on each side have it not; the fishery is common: it is *prima facie* in the king, and is public.

3. If any one claims it exclusively, he must shew a right. If he can shew a right by prescription, he may then exercise an exclusive right, though the presumption is against him unless he can prove such a prescriptive right.

4. A right therefore "to have an exclusive privilege of fishery, although it be an arm of the sea," shall not be presumed, but the contrary *prima facie*. But it is capable of being proved. *Per Lord Mansfield*, assent. cur. in *Carter & al. v. Murcot & al.* 4 Burr. 2162.

### (C) The several Sorts of Fisheries, and what is a several Piscary.

1. **T**O constitute a several fishery it is requisite that the party claiming it should so far have the right of fishing independent of all others, as that no person should have a co-extensive right with him in the subject claimed, (for where any person hath such co-extensive right, there is only a *free fishery*;) but a partial or independent right in another, or a limited liberty does not derogate from the right of the general owner. Therefore in trespass for disturbing the plaintiffs' *several fishery*, a grant of the fishery from Lord C. with the exception of an oystery, and a reservation of a right to the grantor to take fish for the supply of his own table, is a sufficient proof of their title. *Seymour & al. v. Lord Courtenay*, 5 Burr. 2814.

2. In this last case the court gave no opinion, whether there can be a several fishery without the ownership of the soil. *Vide also Kinnerly v. Orpe & al. Dougl.* 56.

3. Mr. *Hargrave*, in a very learned note on the passage cited out of *Co. Lit.* 122. a. in *Smith v. Kemp*, 2 Salk. 637. and *Vin. Abr.* vol. 16. (C), is of opinion that a several fishery may be granted

granted without the foil; but that it is presumed to comprehend the foil, till the contrary appears. *Vide Harg. & Butl. Co. Lit. note 7 to 122. a.*

## (E) Actions and Pleadings.

### 1. TRESPASS for cutting plaintiff's nets and taking his fish.

Defendant justifies as *water-bailiff* of the *Thames* under the king's letters patent, and that the plaintiff was fishing with unlawful nets, contrary to 1 *Bliz. c. 17*. On demurrer, judgment for the plaintiff; for this being an offence contrary to a penal act of parliament, the punishment must follow the method which that act prescribes, and a violation of a public penal statute, is not a nuisance, or abateable as such. *Bulbrook v. Sir Robert Goodere & al.*, 3 *Burr.* 1768. 1 *Black.* 569.

The statute prohibits the taking with particular nets or trawls therein specified, under for-

feiture of a pecuniary sum, and of the fish so taken, and also of the unlawful engines.

2. Debt by the owner of a fishery for a penalty of 5*l.* under 5 *Geo. 3. cap. 14. s. 3 & 4.* for killing fish in his fishery. The defendant was servant to Doctor C., who claimed a right to fish there, and he fished there, in consequence of a notice given by Doctor C. to the plaintiff, that he would order a servant to fish there for the purpose of giving occasion to an action to try the right. Held *per cur.* that he is not liable to the penalty, but within the exception of the act. *Kinnerley v. Orpe*, *Dougl.* 499.

3. To trespass for fishing in the plaintiff's fishery, defendant pleaded that the place is an arm of the sea, in which every subject has a right to fish. The plaintiff in his replication claimed an exclusive right by prescription, traversing the general right; held, that the defendant ought to take issue on the traverse, and ought not to traverse the prescriptive right claimed by the plaintiff; for the first traverse is a material one, and will put in issue the true question in dispute between the parties. *Mayor and Commonalty of Oxford v. Richardson & al.*, 4 *Term Rep.* 437. But reversed in *Cam. Scac.*, 5 *Term Rep.* 367.

## Plea and Demurrer.

### (A) Plea and Demurrer in Equity. Notes.

16 *Vin.* 161.

1. BILL to be relieved against several contracts entered into by the plaintiff with the defendants, relating to shares in a bubble called the *Pennsylvania* bubble, and to have his money repaid,

## Plea and Demurrer.

paid, which he had paid to the defendants for shares sold by them respectively, and charges that the defendants had formed themselves into a society to carry on the fraud; the defendants demurred, because the bill contained several and distinct charges against several and distinct defendants. Demurrer allowed. *Nota*, they denied combinations as is necessary upon such a demurrer. *Bunb.* 69. 1720. *Bull v. Allen*.

2. A demurrer lies to an amended bill, though an answer has been filed to the original bill. *Bunb.* 120. 1722. *Lowther v. Whorwood*.

3. A defendant cannot demur and plead to the same part of a bill; for the plea overrules the demurrer. 3 *P. Wms.* 80. *Mich.* 1730. *Jones v. Earl of Strafford and others*.

4. On time given to answer, defendant may put in a plea, for that is an answer, and upon oath. *Ibid.*

5. A defendant in his plea of a purchase for a valuable consideration, omits to deny notice; if the plaintiff replies to it, all the defendant has to do, is to prove his purchase; and it is not material, if the plaintiff proves notice; for it was the plaintiff's own fault that he did not set down the plea to be argued, in which case it would have been overruled. 3 *P. Wms.* 94. *Hil.* 1730. *Harris v. Ingledew*.

6. The defendant pleads to the whole bill, and on arguing the plea, it was ordered to stand for an answer, without saying one way or other, whether the plaintiff might except: the plaintiff cannot except, for that the court in saying the plea should stand for an answer, must be intended to have meant a sufficient answer; an insufficient answer being as none. 3 *P. Wms.* 240. 1733. *Sellon v. Lewin*.

7. If the defendant's time for answering be out, the court will order proceedings to be revived. So though the defendant by his answer insists that the plaintiff is not entitled to revive; for this ought to be shewn either by plea, or demurrer; but if in such case it appears at the hearing that the plaintiff had no title to revive, he cannot have a decree. 3 *P. Wms.* 1734. *Harris v. Pollard*.

8. After a plea-put in, there can be no motion for an injunction till the plea is argued. 3 *P. Wms.* 397. *Sir Wm. Humphreys v. Orlando Humphreys*.

9. A plea may be good in part and bad in part. 1 *Atk.* 53. 1737. *Duncalf v. Blake*, 2 *Atk.* 44. 1740. *Higgins v. York-Buildings Company*, 2 *Atk.* 283. *Dolmer v. Fortescue*, S. P. 2 *Atk.* 387. *Baker v. Prichard*, S. P. 2 *Ves.* 205.

10. Where a defendant pleads a decree of dismissal of a former cause, for the same matters, in bar of the plaintiff's demand on his new bill, if the plaintiff does not apply to the court, that it may be referred to a Master to state whether there be such a decree, but sets down the cause upon the new bill for hearing, it is a waiver of his right of application for such reference, and the court will determine it. 1 *Atk.* 53. 1738. *Morgan v. Morgan*.

11. The defence proper for a plea must be such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit. The end of a plea is to save to the parties the expence of, an examination of witnesses *at large*; and therefore it is not every good defence in equity, which is good as a plea; for where the defence consists of a variety of circumstances, there is no use of a plea; as the examination must still be at large, and the effect of allowing such a plea will be, that the court will give judgment on the circumstances of the case before they are made out by proof. 1 *Atk.* 54. 1739. *Chapman v. Turner*.

12. Where a bill is brought for new matter discovered since the hearing, a defendant, if he can shew that there is no new matter, must take advantage by plea, or demurrer, for it is too late to insist upon it at the hearing. 2 *Atk.* 40. 1740. *Lewellen v. Mackworth*.

13. A plea must first be removed out of the way before a plaintiff can have an injunction to stay proceedings at law. 2 *Atk.* 113. 1740. *Anon*.

14. Whoever comes into equity for an account of rents and profits, prays a discovery as incident to it; and for that reason a defendant cannot demur and plead to the same matter. 2 *Atk.* 288. 1741-2. *Dormer v. Portescue*.

15. Exceptions cannot be taken to an answer whilst a plea is depending, for that must first be removed out of the way. 2 *Atk.* 390. 1742. *Baker v. Pritchard*. 2 *Atk.* 395.

16. In the plea of an alien there must be an averment that the person was an alien, or else it is no bar. 2 *Atk.* 397. 1742. *Burk v. Brown*.

17. In a plea of conviction for a capital offence, the court of Chancery must judge with equal strictness, as if it were a plea at common law, saying that *A.* gave a mortal wound to *B.* of which he died, without mentioning in what part *B.* received the wound, is bad. So, saying that *A.* was tried at *Galway* assizes, without averring, that the persons who tried him had a commission of gaol delivery, is also bad; for in the plea the jurisdiction ought to be set forth, and that they had a right to try it, or it will not be strong enough to forfeit personal estate. 2 *Atk.* 399. 1742. *Burk v. Brown*.

18. One partner brings a bill against another to discover and be relieved against frauds, &c. the defendant pleaded an agreement, that in case any difference should arise between them, it was to be referred; and that the matters in the plaintiff's bill relate only to the partnership, and yet have never been submitted to arbitration, nor has he ever proposed a reference, though the defendant offered, and was always ready to do it. Lord *Hardwicke* disallowed the plea: for as it was a bill to discover and be relieved against frauds, the arbitrators cannot examine on oath, which, by the agreement, they should have had a power of doing. 2 *Atk.* 569. 1743. *Wellington v. Mackintosh*.



19. Plea to a bill to set aside a will for fraud, and for a receiver, allowed as to the first part; but as to the receiver disallowed. 3 *Atk.* 17. 1743. *Anon.*

20. A plea of a foreign sentence over-ruled, being in a commissary court only, which is of a political nature for determining disputes relating to *French* actions. 3 *Atk.* 215. 1744. *Gage v. Bulkeley.*

21. The defendant, as to so much of the bill as sought to discover whether after institution, &c. to *A.* he was presented to two other livings, and instituted, &c. demurred, as such discovery tends to shew an avoidance of *A.*, the demurrer allowed, because he is not obliged by a discovery to subject himself to a forfeiture, or any thing in the nature of a forfeiture. 3 *Atk.* 453. 1746. *Boteler v. Arlington.*

22. Where a man pleads historically only, and upon his memory, without any averment or certainty, the plea is bad. 3 *Atk.* 550. 1747. *Foster v. Vassall.*

23. To a bill against an arbitrator seeking a discovery of the grounds upon which he made his award, he pleaded in bar, that he was not obliged to set them forth; plea allowed. 3 *Atk.* 644. 1848. *Anon.*

24. Where a plea is to the relief only, and is directed to stand for an answer; the words *with liberty to except*, must be added to prevent the establishing it as a good answer. 3 *Atk.* 814. 1754. *Maitland v. Wilson.*

25. Plea of the stat. of frauds to the discovery of a parol agreement, not allowed where there is a part performance. 1 *Ves.* 297. 1749. *Taylor v. Beech.*

26. On a plea to the jurisdiction, it must be shewn what other court has jurisdiction. 1 *Ves.* 202. 1748-9. *Earl of Derby v. Duke of Athol.* 2 *Ves.* 357.

27. A demurrer is a dilatory, a plea not. 1 *Ves.* 247. 1749. *East India Company v. Campbell.* No second matter may be insisted on by answer. 2 *Ves.* 492. 1752. *Finch v. Finch.*

28. One merely a witness cannot be made a defendant for a discovery of what he is examinable to, unless interested, but he ought to plead thereto, and support it by an answer disclaiming interest, and not demur. 3 *Atk.* 426. 1749-50. *Plummer v. May.*

29. Defendant may plead to discovery of the act causing forfeiture; but not to the discovery of the estate, as whether he is tenant for life or not. 2 *Ves.* 108. 1750. *Weaver v. Earl of Menth.*

30. Plea to the discovery of a marriage, as it would subject to punishment for incest in the ecclesiastical court, though one party was dead, allowed. 2 *Ves.* 243. 1750. *Brownsword v. Edwards.*

*In a plea it is proper to introduce facts and averments to support it, whereas a demurrer can be to nothing which is not upon the face of the bill. Ibid. Averments are necessary to exclude intendment which would be made against the pleader, for the court will always intend the matters charged against the pleader, unless fully denied. 2 *Atk.* 241.*

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31. The putting in a plea is a sufficient compliance with an order for time to answer. 1 Bro. Ch. Rep. 56. 1779. *Roberts v. Hartley*.

*But in the above case, the plea appearing to be for delay, it was ordered to be argued the next day; and being a plea of a sentence of the Court of Admiralty, which was recited in the bill, and therefore bringing no new matter before the court, it was overruled. Ibid.*

32. Plea of the stat. of frauds, averring, first, that there was no agreement in writing; and 2dly, That there was no part performance of such agreement, is a double plea; ordered to stand for an answer, with liberty to except. 1 Bro. Ch. Rep. 404. 1784. *Whitbread v. Brockhurst*.

33. Plea to a bill of revivor, that it was for costs only; the costs having been ordered to be paid into the bank, plea overruled. 1 Bro. Ch. Rep. 438. 1785. *Hall v. Smith*.

34. A plea may be amended, where there is a slip, if the material ground of defence appears sufficient, but not otherwise. 2 Bro. Ch. Rep. 143. 1787. *Newman v. Wallis*.

35. Plea that *Gray's Inn* is a voluntary society, governed by benchers, subject to appeal to the judges, a good plea to a bill relative to the renewal of a lease of chambers. 2 Bro. Ch. Rep. 241. 1787. *Cunningham v. Wegg and others*.

36. Plea of the stat. of frauds, the agreement not being in writing, allowed, though a parol agreement was confessed in the answer. 2 Bro. Ch. Rep. 559. 1789. *Whitchurch v. Bevis*.

37. Plea of payment of a sum of money into the ecclesiastical court to prevent a commission of appraisement, and accepted, and a receipt given, disallowed as a plea in bar to the suit, as it does not shew that the party had no further demand. 3 Bro. Ch. Rep. 70. 1790. *Sumuda v. Furtado*.

38. Defendants to a bill of revivor cannot plead to that suit a plea which had been pleaded to the original bill, and overruled. *Ibid.*

39. Plea of the statute of frauds overruled, the contract being executory. 3 Bro. Ch. Rep. 154. 1790. *Rondeau v. Wyatt*.

40. Plea of the statute of frauds overruled where the contract was acknowledged by letter. 3 Bro. Ch. Rep. 161. 1790. *Tawney and another v. Crowther*.

41. Plea of the stat. of frauds allowed where a written agreement has been essentially varied by parol. 3 Bro. Ch. Rep. 372. 1791. *Jordan v. Sawkins*. 1 Ves. jun. 402. S. C.

42. Plea overruled, one part being inconsistent with the other; but leave was given to withdraw it, and plead *de novo*. 4 Bro. Ch. Rep. 253. 1793. *Nobkissen v. Hastings*. 2 Ves. jun. 84.

43. Plea to a bill of discovery as to a specific performance, and for an injunction; an agreement at law, that the defendant, then plaintiff, would not bring error for delay, or file a bill for an injunction, a bad plea; but the court, after such an agreement, will not grant an injunction as to that suit. 4 Bro. Ch. Rep. 498. 1794. *Anth v. Sambourne*.

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44. Plea to the jurisdiction must shew another jurisdiction; for a plea to the jurisdiction of all courts is absurd, because the same is a plea in bar. *Nabob of Arcot v. East India Company*, 1 Ves. jun. 372. 1791.

45. Every plea must tender issuable matter, upon the truth or falsehood of which it is to be decided. *Ibid.* 393.

46. After plea set down, an order was obtained of course by plaintiff to amend the bill, and served on the defendant; plaintiff not appearing when the plea came on to be argued, it was allowed of course with costs. 1 Ves. jun. 447. 1792. *Jennings v. Pearce*.

47. Where a plea is a bar to the whole bill, if at all, an answer to any matters which might have been covered by the plea, over-rules it. 1 Anstr. 14. East. 32 G. 3. *Blacket v. Langlands*.

48. Where the bill charged an award to have been obtained corruptly, a plea setting up the award, and denying the specific charges of fraud, is bad, as not bringing the cause to one point, an answer to the same charges over-rules the plea. 1 Anstr. 59. Trin. 32 G. 3. *Pope v. Bish.* See *Edmondson v. Hartley*. *Ibid.* 97.

49. Bill by an insolvent debtor against his assignees, and a creditor to his estate, charging collusion: plea that the plaintiff had been discharged under the insolvent act (without shewing that all the requisites had been complied with,) and denying collusion, was held good. 1 Anstr. 101. Mich. 33 G. 3. *Bowser v. Hughes and others*.

50. The plea was over-ruled on the ground of form. The defendant pleaded the same matter again more formally. This is irregular. Anstr. 407. Hill. 34 G. *Freeland v. Johnson*.

51. A submission to arbitration was made a rule of court, and an award made; the bill stated the award to have been obtained by misrepresentation of facts not then known to the plaintiff; plea the award alone, and no answer; plea bad. Anstr. 735. Trin. 36 G. 3. *Gartside v. Gartside*.

52. A plea stating that the plaintiffs, who claimed as citizens of London, never were resident there, or paying scot and lot, and that they were admitted freemen by fraud, for the purpose of enjoying a certain exemption, is bad for duplicity. Anstr. 738. Trin. 36 G. 3. 1739.

16 Vin. 36r.

## (B) To Bills of Account.

1. A Bill for an account against the representative of an *East India* Governor, who pleaded that the plaintiff was an alien born, and an alien infidel, and could have no suit here; plea over-ruled, for being a mere personal demand, the plaintiff may bring a bill in this court. 1 Atk. 51. 1737. *Ramsiffent v. Barker*.

2. Where there is a plea of a stated account to a bill brought for a general one, the plaintiff must amend. 1 Atk. 1. 1736. *Sumner v. Thorpe*.

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3. Plea of a stated account is bad, unless it shews that the account was in writing, and what the balance was. 2 *Atk.* 399. 1742. *Burk v. Brown.*

4. A plea of a stated account, as to all matters before accounted for, is bad; it should aver that it is just and true to the best of the defendant's knowledge and belief. 3 *Atk.* 70. 1743. *Anon.*

5. A defendant is not obliged to set out the account between him and the plaintiff, after an award in his favour relating to that account, for a plea of an award is good, not only to the merits, but to the discovery. 3 *Atk.* 530. 1747. *Tittenfon v. Peat.*

6. Plea that pending suit the parties came to a compromise. Plea good. 1 *Ves.* 297. 1749. *Seavel v. Bridge.*

7. Plea to a bill for an account of a partnership, that all matters in controversy were to be determined by arbitration; allowed. 2 *Bro. Ch. Rep.* 336. 1788. *Halfhide v. Fenning.*

8. Plea of an award and release to a bill to open an account ordered to stand for an answer. 3 *Bro. Ch. Rep.* 196. 1791. *Burton v. Ellington.*

9. Plea by the *East India Company* to a bill for an account filed by the Nabob of *Arcot*, that by charter confirmed by parliament, they had certain powers, by virtue of which the acts were done, over-ruled; it not setting forth the contents of the charters and acts of parliament. 3 *Bro. Ch. Rep.* 292. 1791. *Nabob of Arcot v. East India Company.* 4 *Bro. Ch. Rep.* 180. 1 *Ves. jun.* 372. S. C. 2 *Ves. jun.* 56.

10. Plea, to a bill for discovery of frauds in breach of articles, that there was a clause in the articles, that all matters in difference should be referred to arbitration, but not stating a reference to be depending or to have been had, over-ruled. 4 *Bro. Ch. Rep.* 312. 1793. *Michell and others v. Harris.*

11. Defendant, to a bill for discovery and account, objecting by answer, that he had no concern in the business, must answer fully, though such a plea would bar both discovery and relief. 1 *Ves. jun.* 292. May 1791. *Cartwright v. Hateley.*

12. On a bill for an account after an award, on the ground of matters stated not to have been comprehended in it, it must appear clearly that the award is not final, otherwise a plea of the award is good. 3 *Anstr.* 637. *Mich.* 36 G. 3. *Routh v. Peach.*

### (C) To Bills of Discovery of personal Things.

16 Vin. 563.

1. *A.* by his will made several provisions for his wife, which *B.* his son and heir, after his death, filed a bill against her to set aside; alleging, that she was never married to his father, or if she was, that she had been previously married to *P.*, who was still living. To all the charges in this bill, except what related to her marriage with *P.*, the defendant answered; but as to that she pleaded her marriage with the testator, and cohabiting with him as his wife, and that she had a son by him, who was still living;

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and

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and therefore insisted that she was not compellable to answer the matter of the marriage with *P.* as it tended to criminate and make her guilty of bigamy, which is felony. Plea allowed. 3 *Bro. Par. Ca.* 65. 1725. *Hatfield v. Hatfield.*

2. Bill for a discovery of personal estate against an administrator, and for a distribution; defendant in his answer sets forth the personal estate, but as to the distribution pleads, that the intestate died but in *March* last, and. therefore by the stat. 22 *Car.* 2. he was not obliged to a distribution until the year was expired: but by the opinion of the Lord Chief Baron, *Price & Page* Barons, the plea was over-ruled, and ordered to stand for an answer, with liberty to except; *Montague*, Baron, *dissentiente.* *Bunb.* 64. 1720. *Hart v. King.*

3. Plea to discovery and relief in a bill, which only prayed discovery, over-ruled. *Bunb.* 70. 1720. *Afgill v. Dawson.*

4. If to a bill the defendant answers as to matter of discovery, and pleads only as to relief, the plaintiff may except as to any matters of discovery before the plea argued; for that plainly no matter of discovery is covered by the plea. 3 *P. Wms.* 326. *Trin.* 1734. *London Assurance v. East India Company, in notis.*

5. An insurer by his bill suggests the ship was lost fraudulently, and in the charging part mentions, that instead of proper goods, there was only wool on board, and in the interrogating part prays defendant may set out *what kind of goods he had on board*; defendant pleads several statutes, which make it penal to export wool, in bar to a discovery of all kinds of goods on board: the plea was allowed, because no goods, but wool, were mentioned in the charging part; if there had, the defendant must have answered. 1 *Atk.* 52. 1737. *Duncalf v. Blake.*

6. Bill filed to discover articles pawned to defendant; he pleads that he lent money without notice of plaintiff's claim; the plea should aver, that he has no other articles than those specified; and although this was sworn in the answer, it is not sufficient. 1 *Bro. Ch. Rep.* 578. 1785. *Hoare v. Parker.*

7. Plea of the stock jobbing act, to a bill for a discovery of stock jobbing transactions, over-ruled. 3 *Bro. Ch. Rep.* 11. 1789. *Bancroft v. Wentworth.*

8. Plea to a bill of discovery in support of an action under stat. 9 *Anne, c.* 14. for money lost at play, by the assignees of the loser, a bankrupt, that the action was not commenced and the bill exhibited within *three months*, over-ruled. 2 *Ves. jun.* 514. *Bran- don v. Sandt.* 1794.

9. Plea of alien enemy to a bill of discovery, good. *Anstr.* 462. *Trin.* 34 G. 3. *Daubigny v. Davallon.*

10. A plea, averring this nation to be at war with *France*, and that the plaintiffs are *Frenchmen*, aliens, and enemies of the king, is good. *Ibid.*

(D) To Bills of Discovery of Titles.

16 Vin. 364.

1. PLEA of a fine and long possession under it, is not a good bar to a bill brought for a discovery of the deed, declaring the uses of such fine. 4 Bro. Par. Caf. 253. 1736. *Sir Lister Holt v. Lowe.*

2. Lands devised to be sold for payment of debts; bill by a creditor of the testator against his widow to discover her title to lands in her possession: she pleads a settlement and jointure, and offers to discover, if plaintiff will confirm it, but neither sets out the date nor lands contained in the settlement: the plea was overruled, for she ought to have set forth both those matters. 1 Atk. 52. 1735. *Chamberlain v. Knapp.*

3. A bill was brought to discover, whether A., under whose will the defendant claims, was a papist at the time of a purchase made by A. of the estate from the plaintiff's ancestor. Defendant pleads as to the discovery the statute 11 & 12 Will. 3. by which, if A. was a papist, she was disabled to take. Under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself; and as A. would not have been obliged to discover, the defendant, who claims under the same title, is entitled to the same privilege, and takes the estate under the same circumstances. The plea was allowed. 1 Atk. 526. 1736-7. *Smith v. Read.*

4. The bill seeks a discovery of the defendant Moreland, whether Southcote was not a person professing the popish religion before he conveyed the freehold and copyhold estate to the defendant, in the bill mentioned, as a purchaser thereof. Plea of the stat. 11 & 12 Will. 3. for preventing the growth of popery, so far as it goes to the discovery whether Southcote was a papist, allowed. 1 Atk. 528. 1751. *Harrison v. Southcote and another.*

5. A plea of a bare title only, without setting forth any consideration, will not protect a defendant from giving an answer to the title set up by the plaintiff. 2 Atk. 241. 1741. *Brereton v. Gamul.*

6. Bill by plaintiff claiming by conveyance from his wife, who was one of the heirs at law of John Drew, for an account, &c. The title set up by the bill was, that John Drew was seised of a small estate at the Devizes, and died intestate in 1737, leaving plaintiff's wife and two of the defendants his heirs at law; that is, the two defendants and plaintiff's mother were the children of Robert, the nephew of John Drew; and that plaintiff's wife, before marriage, and in consideration of a settlement conveyed to plaintiff in fee; the defendant Garth pleaded a title under Robert, the nephew of John, and grandfather of plaintiff's wife; that Robert being, or pretending to be seised of the estate in fee after the death of John Drew, conveyed for 300l. to Fowler, and then sets out several conveyances afterwards, so as to bring the estates into him-

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self in 1747. Lord Henley, Chancellor, over-ruled the plea, because it did not set out *how* Robert became entitled to the reversion, which it ought to do, being a title to a particular estate, and Robert not in possession at the time of the conveyance. *Ambl.* 422. 1762. *Hughes v. Garth.*

7. Plea that a writ of right had been tried and determined against the plaintiff (who was demandant in the writ of right): a good plea to the discovery of the defendant's title. 1 *Bro. Ch. Rep.* 305. 1783. *Earl of Leicester v. Perry.*

8. Plea that the plaintiff is *not heir*, where he had deduced his title as such, is bad: the title ought to be denied, as explicitly as it is laid. 2 *Bro. Ch. Rep.* 143. 1787. *Newman v. Wallis.*

9. Plea of a conveyance, fine, and nonclaim is not multifarious, but a good plea to a bill impeaching the conveyance, as not being for valuable consideration, 2 *Bro. Ch. Rep.* 274. *Doble v. Credland.* 1787.

10. To a charge in the bill that A. died seised in fee of estates in *Derbyshire* and elsewhere, plea of a fine of all the estates charged in the bill, and of which A. died seised in fee, sufficient without averments that they were in *Derbyshire* and none elsewhere. 1 *Ves. jun.* 136. 1790. *Butler v. Every.* 3 *Bro. Ch. Rep.* 80. S. C.

11. Bill of foreclosure as to a messuage and forty acres of land: plea deducing a title to the premises, and stating them to be a *messuage and tenement*. The plea is bad, as not relating to the land demanded. *Anstr.* 633. *Mich.* 36 G. 3. *Wedlake v. Hutton.*

16 Vin. 166.

## (E) To Bills of Discovery. Want of Parties.

1. A Plea for not bringing the representatives of the personal estate before the court, allowed; the bill being only against the representatives of the real estate. 2 *Ath.* 51. 1740. *Plunket v. Penfon.*

2. An inquisition of attainder is only to inform, and does not entitle the crown to any right; and therefore it was held that it was not necessary to make the Attorney-General a party. 2 *Ath.* 399. 1742. *Burk v. Brown.*

3. There is sometimes a demurrer for want of parties, sometimes a plea; a demurrer where it appears on the face of the bill; but where it appears by way of averment, there must be a plea of want of parties. 1 *Ves.* 427. *May* 1749-50. *Plummer v. May.*

16 Vin. 366

## (F) To a Bill of Discovery, that he is a Purchaser, &amp;c.

1. WHERE a party pleads his title, and swears himself a purchaser for a valuable consideration without notice of the plaintiff's title, a court of equity ought not to allow any examination of witnesses *in perpetuam rei memoriam*, to defeat the title of such

such purchaser, but leave the plaintiff to recover as he can, without giving him any assistance. 3 Bro. Par. Ca. 473. 1729. *Ross and others v. Close and others.*

2. A defendant, in his plea of a purchase for a valuable consideration, omits to deny notice; if the plaintiff replies to it, all the defendant has to do is to prove his purchase, and it is not material if the plaintiff proves no notice, for it was the plaintiff's own fault that he did not set down the plea to be argued, in which case it would have been over-ruled. 3 P. Wms. 94. Hil. 1730. *Harris v. Ingledew.*

3. In a plea of a purchase, it is a sufficient denial of notice to say that *at the time* of the purchase he had no notice, without saying or at any time before. 3 P. Wms. 244. Hil. 1733. *Jones v. Thomas.*

4. In all cases of a plea of a purchase or marriage settlement, notice must be denied though not charged by the bill; and it may be sufficient to deny it either by the plea or answer, notwithstanding the objection that it ought to be in the plea, since all the defendant has to do is to prove his plea; for the defendant is not to prove a negative, viz. that he had no notice. However it seems best to deny notice both in the plea and the answer. *Aston v. Curzon*, Hil. 1719. *In notis*, 3 P. Wms. 243. *Weston v. Berkeley*, *Ibid.*

5. In the pleading of a purchase or mortgage, the defendant must plead that the seller or mortgagor was or pretended to be seised in fee. 3 P. Wms. 281. *East*. 1734. *Head v. Egerton.*

6. On a plea of a purchase for a valuable consideration, without notice of the plaintiff's title, it is sufficient to aver, that the person who conveyed was seised or pretended to be seised when he executed the purchase deeds, but where a purchaser sets up a fine and non-claim as a bar, he must aver that the seller was *actually* seised, 2 Atk. 630. 1743. *Story v. Lord Windsor.*

7. A purchaser, denying notice at or before the execution of the deeds, is not sufficient; he must aver that he had notice at or before the payment of the money. 2 Atk. 630. 1743. *Ibid.*

8. To a bill for possession, a purchase for a valuable consideration is pleaded, and that the money is *bonâ fide* secured to be paid; being only secured it may never be paid, and the plea therefore over-ruled, 3 Atk. 304. 1745. *Hardingham v. Nichols.*

9. Where the bill charges particular and special instances of notice of the plaintiff's title on the defendant, his denial of notice generally is not sufficient; and therefore the plea of a purchase for a valuable consideration without notice was over-ruled. 3 Atk. 815. 1754. *Radford v. Wilson.*

10. Plea to discover whether one, from whom the defendant purchased, was a papist, allowed. 2 Ves. 389. 1751. *Harrison v. Southcote.*

11. Where the bill states circumstances of notice, a plea of *purchase without notice* alone is not sufficient, but must deny the circumstances. 2 Bro. Cha. Rep. 143. 1787. *Newman v. Wallis.*

12. Plea



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12. Plea of a purchase for a valuable consideration is not good to a bill for dower. 3 *Bro. Ch. Rep.* 264. *Williams v. Lambe.*

13. Plea that defendant's testatrix had neither *constructive or actual notice of the plaintiff's title*; not denying the facts stated in the bill from which the constructive notice is to be deduced, bad. 4 *Bro. Ch. Rep.* 322. 1793. *Jerrard v. Sanders.* 2 *Ves. jun.* 187. S. C.

14. Plea, that the person through whom the plaintiff claims died a bachelor and without issue, ordered to stand for an answer. 4 *Bro. Ch. Rep.* 439. 1793. *King v. Holcombe.*

15. Plea of a fine over-ruled, because no seisin was alleged. 2 *Ves. jun.* 450. 1794. *Page v. Lever.*

16. Bill by tenant for life in possession for discovery and delivery up of title deeds: plea, a mortgage in fee by a former tenant for life, alleging himself to be seised in fee, without notice, ordered to stand for an answer with liberty to except. 3 *Ves. jun.* 222. 1796. *Strode v. Blackburne.*

26 Vin. 367.

## (G) Former Suits, Decrees, &amp;c.

1. TO a bill filed in *Ireland*, the defendant pleads a decree and proceedings for the same matter in the court of Chancery of *England*. Plea allowed. 3 *Bro. Par. Ca.* 584. 1731. *Fitzgerald v. Fitzgerald.*

2. To a bill brought for a renewal of a lease for lives, the defendant pleads the minutes of a former decree in a suit brought for the same purpose, by the person under whom the present plaintiff claimed, and by which minutes the court ordered that bill to be dismissed. This plea was not allowed, but stood for an answer with liberty to except. 6 *Bro. Par. Ca.* 73. 1765. *Charles v. Rowley.*

3. An administrator of a judgment creditor brought the original bill, and died; the executor of the administrator brought the bill of revivor, which was thought to be wrong, and thereupon another bill of revivor was brought by the same plaintiff, having first taken out administration *de bonis non*, &c. to the judgment creditor; the defendant pleaded the bill was for the same matter, and upon this it was referred to the Master to examine whether it was so, who made a special report, that the *last bill of revivor* is brought by the plaintiff *in a different right* from what the former was, but does not say it was or was not for the same matter. Plea over-ruled, because it appeared that the bill was brought by a person in a different right. 2 *Atk.* 144. 1740. *Huggins v. The York Buildings Company.*

4. A co-administrator, who was a plaintiff in a bill in 1723, brings a bill in 1739, partly of revivor, and partly supplemental, to the same purpose pretty near with the original bill. Plea of the former dismissal allowed. 2 *Atk.* 82. 1740. *Bowden v. Beauchamp.*

(H) That it is Matter at Law.

26 Vin. 369.

1. **T**O a bill for setting aside certain leases as being improperly made, the defendant pleaded that the question was properly triable at common law only, and the plea was allowed. 7 Bro. Par. Ca. 374. 1776. *Hon. Hely Hutchinson v. Gamble and others.*

2. *A.* by lease grants *B.* a liberty of searching and digging for coals in certain lands, for a term of 100 years, rendering an eighth part of the coal by way of rent. The colliery is worked for some years and then discontinued. The person claiming the land under *A.* begins to work the mine, whereupon those claiming under *B.* file a bill to restrain the working, and for a discovery of their title, in order to maintain an action of trespass; to this bill the defendants plead in bar, both to the discovery and relief, that *B.* and those claiming under him, had ceased working the colliery for a space of 55 years, and had therefore waived and relinquished the benefit of the lease; but the plea was over-ruled; the matter of it being properly determinable at law. 7 Bro. Par. Ca. 404. 1776. *Crang v. Adams.*

3. An award was made a rule of the court of King's Bench according to a submission for that purpose, and an attachment had been granted for not performing the award, bill suggesting fraud in the arbitrators, and praying that the award might be set aside; plea of the award, and insisting that it was fair: plea was ordered to stand for an answer. 2 Atk. 155. 1740. *Hampshire v. Young.*

4. Plea of matter which would be a good plea to the action at law, not a plea here in bar of discovery. 2 Bro. Ch. Rep. 7. 1785. *Hindman v. Taylor.*

(I) Limitations. Statutes.

26 Vin. 370.

1. **T**HE stat. of limitations was pleaded to a bill of discovery, and over-ruled. Bunb. 60. 1720. *Dean and Chapter of Westminster v. Sir Thomas Cross.*

2. The statute of limitations is no plea where the bill charges fraud, but then it should be charged by the bill that the fraud was discovered within six years of the filing of the bill. 3 P. Wms. 144. *Mich.* 1732.

3. In the case of the *South Sea Company*, in whom the estates of the late directors are vested by act of parliament, where the stat. of limitations might have been pleaded against the late directors, it is pleadable against the company, who stand in such directors' place. *Ibid.*

4. Where the assignee of the effects of a bankrupt claims under the act of parliament; yet as the statute of limitations might be pleaded

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pleaded against the bankrupt, by the same reason it is pleadable against such assignee. 3 *P. Wms.* 144. *Mich.* 1732.

5. The statute of limitations cannot be pleaded to the discovery when the debt was due, though it may to the debt itself, because, by the defendant's setting forth when the debt commenced, it will appear to the court, whether the six years are incurred according to the statute. 2 *Atk.* 51. 1740. *Mackworth v. Clifton.*

6. The defendant pleaded a fine and non-claim in bar to the title set up by the plaintiff; the plea was over-ruled, because the pendency of the suit here, as it was a proper matter of equity, has prevented the running of the fine. 2 *Atk.* 389. 1742. *Baker v. Pritchard and others.*

7. Bill by a creditor of an intestate for 100*l.* on note, charging that the administratrix promised to pay it, as soon as she could get in effects, to which she pleaded the statute of limitations, and that she made no promise to pay the note, too general, for she should have pleaded, that she made no promise to pay the note out of assets. Plea of the statute of limitations must say the cause of action *hath not accrued within the six years*, that the defendant hath not promised to pay within six years, is bad. 3 *Atk.* 70. 1743. *Anon.*

8. When fraud is charged, the defendant cannot plead the statute of limitations to the discovery of his title, but must answer to fraud, 3 *Atk.* 558. 1747. *Bicknell v. Gough.*

9. Length of time proper for a plea, not a demurrer. 2 *Ves.* 110. 1750. *Gregor v. Moleworth* See *Aggas v. Pickersill*, 3 *Atk.* 225.

10. Plea to a bill of discovery in support of an action under stat. 9 *Anne*, c. 14, for money lost at play, by the assignees of the loser, a bankrupt, that the action was not commenced, and the bill exhibited within three months, over-ruled, 2 *Ves. jun.* 514. 1792. *Brandon v. Sands.*

11. Bill by an annuitant under a will for an account of arrears against two administrators with the will annexed: one pleaded the stat. of limitations to so much as sought satisfaction for the arrears, or so much as was stated to have accrued due previous to six years before the bill: he also by answer set up an agreement to relinquish the annuity: plea over-ruled without prejudice to insisting on the same matter by answer. 2 *Ves. jun.* 571. 1795. *Higgins v. Crawford.*

12. Defendant pleaded 40 years possession without account, or admission of any debt to a bill setting up an old mortgage, and stating an account settled, and that owing to infancy, coverture, and other disabilities, plaintiffs could not proceed: plea allowed. 2 *Ves. jun.* 669. 1795. *Blewitt v. Thomas.*

(L) Releases.

16 Vin. 371.

1. TO a bill for account and discovery, plea of release farther and other than in the plea set forth; plea over-ruled. 2 *Ves.* 108. 1750. *Salkeld v. Science.*

*So a plea containing exception of matters after mentioned over-ruled. 2 Ves. 108. Ibid.*

2. Bill charging fraud in obtaining release; plea, the release, supported by an answer, denying the fraud, the benefit of the plea was saved to the hearing. 2 *Ves.* 258. *Trin.* 33 G. 3. *Lloyd v. Smith.*

3. Bill to set aside release for fraud; plea the release nakedly, and no answer. The court would not give leave to amend, but over-ruled the plea. 1 *Anst.* 276. *Trin.* 33 G. 3. *Freeland v. Johnson.*

(Q) Put in. At what Time.

16 Vin. 374.

1. A Demurrer not coupled with a plea or answer, must be filed within eight days, exclusive of the day of appearance, or before an order for time be obtained. *Hind.* 210.

2. On time given to answer, the defendant may put in a plea, for that is an answer; and on oath, but he cannot put in a demurrer. 3 *P. Wms.* 81. 1730. *Jones v. Earl of Strafford.* 1 *Bro. Ch. Rep.* 56. *Roberts v. Hartley.*

3. Demurrer may be filed after time for answering is out, provided it be filed before process of contempt issues. 3 *Bro. Ch. Rep.* 372. 1791. *East India Company v. Henckman.*

4. If an order be obtained for time to answer only, a demurrer to part will not do. 2 *Bro. Ch. Rep.* 214. 1787. *Kenrick v. Clayton.*

(R) How the Plea, or Plea and Demurrer must be.

See letter A. See Demurrer.

(S) Pleas. Of setting down the Plea to be argued, *16 Vin. 375.*  
*&c. and what shall be said a Waiver.*

1. WHERE a plaintiff replies to a plea, he admits it to be a good bar, if the facts therein alleged are true: and therefore he cannot afterwards complain of the order made for allowing the plea, but must proceed to examine witnesses to falsify it. 4 *Bro. Par. Ca.* 74. 1732. *Lord Baron Dunsany v. Shaw.*

2. Pl a must be set down in eight days. 3 *Bro. Ch. Rep.* 1791. *Jordan v. Sawkins.*

3. A plea of outlawry, like all other pleas, ought to be set down by the defendant. 2 *Anstr.* 554. *East.* 35 G. 3. *Chapman v. Lansdown.*

26 Vin. 377. (T) Over-ruling his own Plea. What shall be said to be.

1. **W**HERE a defendant insists by plea, that he ought not to be obliged to discover the several matters mentioned in the introduction of it, and yet by his answer discovers those very particulars, the plea is bad in point of form. 6 *Bro. Par. Ca.* 116. 1766. *Dobbyn v. Barker.*

2. Plea overruled, being coupled with an answer which admitted the facts. 2 *Atk.* 155. 1740. *Cottingham v. Fletcher.*

3. Where a plea is a bar to the whole bill, if at all, an answer to any matters, which might have been covered by the plea, overrules it. 1 *Anstr.* 14. *East.* 32 G. 3. *Blacket v. Langlands.*

4. Where the bill charged an award to have been obtained corruptly, a plea setting up the award, and denying the specific charges of fraud, is bad, as not bringing the cause to one point, and an answer to the same charges over-rules the plea. 1 *Anstr.* 59. *Trin.* 32 G. 3. *Pope v. Bish,* and *Edmundson v. Hartley* *Ibid.* 97. S. P.

5. To support a plea of a former decree, so much of the first bill and answer must be set forth as will shew that the same point was then in issue. 2 *Atk.* 603. 1743. *Sir Caesar Child v. Gibson.*

6. Whoever comes in before a Master under a decree is *quasi* a party to that suit; and if he brings a new bill, a plea that a former suit is still depending, allowed. 3 *Atk.* 557. *New v. Weston.*

7. To a bill brought against the defendant as an executor to account, he pleads a suit in the court of Chancery at *Jamaica*, brought against him by the plaintiff, with the like matter of complaint relating to the executorship; neither the terms, nor even the year in which the suit was instituted, being set out for certain, there is not that averment which courts of law and equity both require in pleas; and it was over-ruled. 3 *Atk.* 587. 1747. *Foster v. Vassall.*

8. Though an action has been brought in *Ireland* off a bond, and sued to judgment there, it cannot be pleaded to an action here. 3 *Atk.* 589. 1747. *Foster v. Vassall.*

9. If no final order for foreclosure, it is not a good plea to a bill for redemption. 2 *Ves.* 450. 1752. *Senhouse v. Earl.*

10. Plea of another suit depending for the same cause was referred to the Master of course, without being set down. 1 *Ves. jun.* 484. 1792. *Anon.*

11 Plea of a former suit depending for the same cause set down by the defendant was struck out; but the plaintiff not having

having procured a reference to the Master within a month, the bill was, upon motion, dismissed under the standing order. 2 *Ves. jun.* 672. 1795. *Baker v. Bird.*

12. Plea of a suit depending in the court of Chancery in *Ireland* for the same matter, over-ruled. 4 *Ves. jun.* 357. 1798. *Lord Dillon v. Alvarez.*

## Plea and Pleadings.

[C]

### (B) Of Pleadings in general. Good or not.

16 Vin. 377.

1. IF two or more join in a defence which is a sufficient justification for one, but no justification for the others, the plea is bad as to all; for the court cannot sever it, and say that one is guilty and others not, when they all put themselves upon the same terms. *Philips v. Biron*, 1 *Stra.* 509. and *vide* 1 *Stra.* 994. *Ibid.* 1184. 3 *Term Rep.* 376.

2. On a writ in debt for 1066*l.* plaintiff declared for 100*l.* borrowed by defendant of plaintiff; and in a second count for 66*l.* for interest of money lent by plaintiff to defendant, defendant pleaded in abatement of the writ, that the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from plaintiff, was borrowed by defendant and others, and not by defendant separately. On special demurrer, because this plea answered only one of the causes of action, (that mentioned in the first count), the court held the plea bad. *Herries v. Jamieson*, 5 *Term Rep.* 553.

3. A plea of prescription for common in a *que estate* is good after verdict, though it be not in *express terms* alleged that the owners of the estate have used it from time immemorial. 3 *Term Rep.* 147.

4. To action on the case, if defendant pleads a recovery, and plaintiff replies *nul tiel record*, and concludes with averment, it is good; especially if it is a record of another court: but (*semb.*) he may also conclude with giving a day to defendant to produce the record. *Sandford v. Rogers*, 2 *Wils.* 113.

5. Plea of bankruptcy ought to conclude to the country. *Barnes*, 330. *Andr.* 176.

6. If to covenant by an executor, defendant pleads another executor who has proved, and is living, plaintiff's replication should conclude to the country. *Wilkins v. Brown*, 2 *Stra.* 1220.

7. Bond that *A.*, on thirty days demand in writing, should account and pay: breach assigned, that *A.* did not account and pay in thirty days after demand in writing: pleas, 1st, no demand;

2d,

## Plea and Pleadings.

2d, (protesting on demand, &c.) that *A.* did account and pay: replication, that a demand in writing was made on a day (naming it), and no account by *A.* This concludes well to the country. *Trapand v. Mercer*, 2 *Burr.* 1022.

8. If a plea begin with an answer to the whole declaration, but in truth the matter pleaded is only an answer to part, the whole plea is bad, and the plaintiff may demur. *Truscott v. Carpenter*, 1 *Ld. Raym.* 231. *Woodward v. Robinson*, 1 *Str.* 303.

9. But if a plea begin only as an answer to part, and is in truth but an answer to part, or though in law it is an answer to the whole, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by *nil dicit*; for if he demur, or pleads over, the whole action is discontinued. *Truscott v. Carpenter*, 1 *Ld. Raym.* 231. *Vincent v. Burton*, *ibid.* 716. See also 2 *Ibid.* 841. 1 *Str.* 302.

10. But this rule must be understood with this limitation, that the part of the declaration which is not answered by the plea is material, and the gist of the action; for where any thing is inserted in the declaration as *matter of aggravation*, the plea need not answer or justify that, for the answering of that which is the gist of the action will cover the whole declaration. *Dye v. Leatherdale*, 3 *Wils.* 20. *Taylor v. Cole*, 3 *Term Rep.* 297.

11. A plea that plaintiff is an *alien*, is not sufficient in personal action, without shewing that he is *inimicus*. *Hopper v. Leppett*, *Andr.* 76.

12. Where in debt against one as executor the defendant plead a retainer, and plaintiff replies that he is executor *de son tort*, and defendant rejoins, that after the last continuance he hath taken out administration; this last is a good plea, and no waiver of the former. *Vaughan v. Brown*, *Andr.* 328.

13. Bond conditioned to pay money "on or before such a day," plea of "payment at a day before the particular day specified." The plaintiff demurred to the plea, as offering an immaterial issue. The distinction is, "that wherever the defendant, in an action of debt upon bond, with a special condition, pleads *performance*, the plaintiff must assign an *absolute* breach: though "this be not necessary, where the defendant pleads a collateral matter, (as a release). The present plea thereof is *proper*, and "the plaintiff ought to reply, that the money was not paid upon "the day alleged, *nor* at any time before or after that day." *Fletcher v. Hennington*, 2 *Burr.* 944.

14. *Non est factum* may be pleaded to the deed of a *feme covert*, not to the deed of an *infant*, for the deed of the former is *void*, of the latter only *voidable*, and the *infancy* must be pleaded specially, and that plea avoids it by relation back to the delivery. *Zouch ex dem. Abbott v. Parsons*, 3 *Burr.* 1805.

15. In debt for a penalty on 2 *Geo. 2. c. 24. s. 7.* for unlawfully corrupting voters at an election to parliament, the defendant pleads in *abatement*, an action brought against him by another person in the same term for the same offence. This is a *bad* plea.  
Defendant

Defendant must shew the other action to be actually prior in point of time. *Combe v. Pitt*, 3 Burr. 1422.

16. In a release pleaded, no place was alleged, and held a material omission on a general demurrer. *Barker v. Palmer*, 1 Com. Rep. 141.

17. To an action upon promises, defendant pleads that after he had undertaken to pay, one A. B. promised to pay the money due to the plaintiff: and held a bad plea, because the promise was not in writing. *Barker v. Lamplugh*, 1 Com. Rep. 142: Vide 2 Term Rep. 81.

18. A plea of the performance of a will generally, is bad; for it does not appear whether the legacies were paid, or whether any one was dead, whereby his legacy should be given to the survivors, nor when, or in what manner they were paid. 1 Com. Rep. 162. *Hervey v. Richardson*.

19. The bankruptcy of the defendant cannot be pleaded in bar to an action of covenant for rent, or on express covenant. *Mills v. Auriol*, 1 H. Bl. 433. 4 Term Rep. 94.

20. To an action brought by a simple contract creditor against an executor *de son tort* of an intestate, the executor cannot plead, that *after action brought*, but *before plea pleaded*, he delivered over the effects to the rightful administrator, though in fact no administration was granted till after the action was brought; nor can he plead a retainer for his own debt of a superior degree, with the assent of the administrator. *Vernor v. Curtis, in the Exchequer-chamber in error*. Hil. 32 Geo. 3. 2 H. Bl. 18.

21. An argumentative plea is not good, but shall be aided by verdict on a general demurrer. *Wall v. Fullwood*, 1 Com. Rep. 330. (n. 2.)

22. A plea of the stat. 13 Eliz. c. 20. was allowed to be good, when pleaded to a bill brought by a lessee for tithes. *Bokenham v. Bentsfield*, 1 Com. Rep. 392.

23. To an action brought by the assignees of an insolvent debtor, to recover money owing to him before his insolvency, in which the plaintiffs declare, that in consideration of the money being due to the insolvent, the defendant promised to pay them as assignees, it is a *bad plea* to say, "that the cause of action first accrued to the insolvent before the plaintiffs became assignees, and that six years had elapsed after the cause of action first accrued to the insolvent, and before the suing out of the writ of the plaintiffs." *Kinder v. Paris*, 2 H. Bl. 561.

24. Plea to a bond conditioned for payment of money, that it was given as an indemnity against another bond, and that the plaintiff has not been damnified, is *bad*. *Meuse v. Meuse*, 1 Cowp. 47.

25. *Riens in arrears* is a good plea to an action of debt for rent. *Warner v. Theobald*, *ibid.* 588. *Secus*, in an action of covenant, admitted *arguendo*.

26. In debt on a bond, plea that the money for which the bond



## Plea and Pleadings.

was given was won by gaming is well enough, though not the very words of the statute. 1 *Str.* 491.

27. That which appears in the plaintiff's declaration need not be averred in the plea. *Ibid.*

28. Where the defendant pleads that the bond was given for money won by gaming, he must shew the particular game at which it was won. *Ibid.*

29. Special plea of *nil habuit in tenementis* cannot be pleaded to action for rent on lease by indenture. *Palmer v. Ekins*, 2 *Str.* 817.

30. Upon a *devastavit* against executors, not guilty may be pleaded as well as *nil debet*. *Coppin q. t. v. Carter*, 1 *Term Rep.* 462.

31. In *assumpsit*, "that the defendant indorsed over to the plaintiff a promissory note for and on account of the debt, and "that the plaintiff then and there accepted it for and on account "of the debt," is a good plea; for the plaintiff might have indorsed it over to a third person, by whom the defendant might have been sued without the means of defence, or the plaintiff might by laches have made it his own: but in such case the plaintiff may reply, that the note was bad, or unpaid. *Keaylake v. Morgan*, 5 *Term Rep.* 513.

32. A plea by an heir at law, who was sued by an obligee of his ancestor, that he claimed to retain a certain sum for money laid out in repairing the premises, cannot be supported. *Shuttleworth v. Neville*, 1 *Term Rep.* 454. *Qu.* Whether necessary repairs might be so pleaded. *Ibid.* 457.

33. To *assumpsit* by several partners the defendant may plead in bar the bankruptcy of one of them. *Eckhardt v. Wilson*, 8 *Term Rep.* 140.

34. *Non damnificatus* cannot be pleaded to debt on bond, conditioned for the payment of a sum of money at a certain day, though it appear by the condition that the bond was given by way of indemnity. *Holmes v. Rhodes*, 1 *Bos. & Pull.* 638.

35. A plea that the plaintiff and defendant agreed to settle all matters in dispute, and to bind themselves in a penalty not to sue each other, is a bad plea, as it does not amount to satisfaction. *James v. David*, 5 *Term Rep.* 141.

36. Replication *de injuriâ suâ propriâ absque tali causâ*, is bad, where the defendant insists on a right. *Cooper v. Monk*, *Will.* *Rep.* 54.

37. So it has been determined, that a plea *de injuriâ suâ propriâ absque tali causâ* to a recognizance for rent in arrear, is bad. *Jones v. Kitchen*, 1 *Bos. & Pull.* 76.

38. Performance of a covenant pleaded otherwise than in the terms of the covenant itself is bad, even on general demurrer. 1 *Bos. & Pull.* 458.

39. In pleading a tender of a sum of money according to a defeazance, which is a different instrument from the original deed, it is not necessary either to plead that the party has always been,

been, and still is ready to pay, or to bring the money into court: *Trevett v. Aggas*, *Willes' Rep.* 110. *Aliter* if the defeazance be in the same deed. *Ibid.*

40. Plea to *assumpsit* that the defendant, who was the payee of a promissory note indorsed it to the plaintiff, "for and on account of" the said debt, is a good plea. *Kearlake v. Morgan*, 5 *Term Rep.* 513.

41. Pleading that corn which had been cut was left on the ground until it was fit, in a course of husbandry, to be carried, is sufficient, without saying how long it remained there, the reasonableness of the time being a question of fact for the jury, and not a question of law for the court. *Eaton v. Southby*, *Willes' Rep.* 134.

42. To a debt on bond conditioned for the payment of a certain sum at a certain day, defendant pleaded, that by articles of agreement between the plaintiff, her sister, and the defendant, the interest of the money was to be paid to one of the sisters upon an event which had happened; but as the plea did not allege the payment of the interest accordingly, it was holden bad. *Baldee v. Eiders*, 5 *Term Rep.* 250.

3. A charter of *Will.* 3. granted to the town of *Liverpool*, directs that the common councilmen shall be elected in such manner as was used before the former charter of *Car.* 2. The defendant to a *quo warranto* information for exercising the office of common councilman, pleaded, that before the charter of *Car.* 2. the mayor, bailiffs, and burgesses, used to elect, (except at those times when there was any bye-law to regulate the mode of election:) it was held that the plea was bad, because it did not shew what was the usage in fact before the charter of *Car.* 2. *Rex v. Birch*, 4 *Term Rep.* 608.

(E) At what Time Defendant must plead.

16 Vin. 382.

1. IF a bill be filed against an attorney, or other privileged person, or against a prisoner, and a copy thereof delivered, four days exclusive before the end of the term, including Sunday, the defendant must plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea; but if the bill be not filed, and copy delivered within that time, the defendant is entitled to an imparlance. Rule M. 5 Ann. 3. *a. Gilb. K. B.* 346. Afterwards, when the clause of *ac etiam* was introduced into the bill of *Middlesex*, and other process in trespass, it became a rule, that where the cause of action was specially expressed in the process, the defendant should not have liberty of imparlance without leave of the court, but should plead within the time allowed by the course of the court, to defendants sued by the original writ. *R. H.* 2 *Geo.* 2. At length it was determined, that even upon a special *capias* by original, the defendant should not be obliged to plead sooner than upon a common *latitat.* 1 *Str.* 684.

• 2 Str.  
3164. 1 Str.  
211. *contra*.

2. If four terms have elapsed since the delivery or filing of the declaration, the defendant shall have a whole term's notice to plead before judgment can be entered against him. *R. Tr.* 5 & 6 *Geo.* 2. (b.); unless the cause has been stayed by *injunction* or privilege. *B. 2. Burr.* 660. *Dougl.* 71. And the notice in such case must be given before the *esoin-day* of the term\*, but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment signed in the vacation. 2 *Term Rep.* 40.

3. This rule was established for the purpose of preventing any surprise on the defendant after the plaintiff has lain by four terms, without proceeding in his action; and therefore it does not apply where the proceedings have been delayed at the defendant's request. 3 *Term Rep.* 530. 2 *Bl. Rep.* 762.

4. In all cases where the defendant has appeared and filed common bail, or put in and perfected special bail, or the plaintiff has appeared and filed common bail for him according to the statute, and the declaration is delivered or filed, and notice thereof given four days *exclusive* before the end of the term in which the writ was returnable; if the venue be laid in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the declaration shall be delivered or filed *absolutely*, with notice to plead within four days; or in case the action be laid in any other county, or the defendant live above twenty miles from *London*, within eight days *exclusive* after the delivery or filing thereof; and the defendant must plead accordingly without any imparlance, or in default thereof, the plaintiff may sign judgment. Rule T. 5 & 6 G. 2. (a).

5. If the declaration be delivered or filed, with notice to plead within the *first* four days of term, the defendant has all the morning of the *fifth* day to plead; and judgment cannot be signed, for want of a plea till the opening of the office in the afternoon of that day. *Shepherd v. Mackreth*, 2 *H. Bl.* 284.

6. But in any other part of the term, if the defendant do not plead within four days, the plaintiff may sign judgment on the morning of the fifth day: and if a plea be not put in the day the rule expires, and the other party do not take advantage of it immediately, the defendant may deliver his plea at any time before judgment is actually signed against him. 1 *Term Rep.* 16. 4 *Term Rep.* 195, 6. 5 *Ibid.* 35. *Tidd's Pr.* 387.

7. Where the defendant has not appeared or filed bail, the rule is that, "upon all process returnable before the *last* return of any term, where no affidavit is made and filed of the cause of action, the plaintiff may file or deliver the declaration *de bene esse* at the return of such process, with notice to plead in "eight days *exclusive* after the filing or delivery thereof." being the same time as is allowed for the defendant to appear and file common bail, and if the defendant do not file common bail, and plead within the said eight days, the plaintiff having filed common bail for him, may sign judgment for want of a plea. Rule T. 22 G. 3. And *vide* rule M. 10 G. 2.

8. But

8. But if the declaration be not filed until *after* the return of the process, the defendant has eight days to plead from the time of filing it, whenever it may be. 1 Burr. 56. *Delatre v. Mango*.

9. If the defendant plead before the bail are perfected, his plea will be considered as a nullity. 4 Term Rep. 578.

10. If a plea be demanded on a *Saturday*, the defendant has twenty-four hours to plead after the demand, exclusive of *Sunday*. *Solomons v. Freeman*, 4 Term Rep. 557.

11. Though a rule to plead expire on a *dies non juridicus*, the defendant is bound to plead on or before that day, and if he does not, judgment may be signed on the next day. *Mesure v. Brittain*, 2 H. Bl. 616.

12. Every plea in abatement must be pleaded before the rule for pleading is out, and cannot be pleaded after an imparlance, unless the declaration be delivered so late in the term that the defendant is not bound to plead to it in that term, or be delivered after term, in both which cases the defendant may within four days inclusive of the subsequent term, plead any plea in abatement, as of the preceding term. Per Buller J. *Jennings v. Webb*, 1 Term Rep. 278.

13. The four days allowed for pleading in abatement are both inclusive. *Ibid*.

14. If declaration is delivered to a prisoner the last day but one of a term, he must plead two days before the *effoin* of next term. *Barnes*, 224.

15. Formerly the rules to plead ran for eight days, and the four first only were allowed for pleas in abatement: but pleas in chief were sufficient, if they came in before judgment signed. In *Trin.* 6 G. 2. the time of pleading was shortened to four days, and no provision for any distinction between the two sorts of pleas; but this does not enlarge the time as to pleas in abatement, which must still come in within the four days, and cannot be received after. *Long v. Miller*, 2 Stra. 1192. *Wilf.* 23. *Anderson v. Ballistade*, 2 Stra. 1268.

16. If the plaintiff do not demand a plea, the defendant may plead in bar after the expiration of the four days, but he cannot plead in abatement after the four days, though no demand made; and if he do, the plaintiff may sign judgment. 1 Term Rep. 689.

17. Where a plea in abatement is not merely dilatory, but goes to the merits of the cause, the court will allow the defendant a longer time than the four days to offer such a plea, in the same manner as they will permit a tender after a special imparlance. Per Lord Kenyon C. J. *Milner v. Milnes*, 3 Term Rep. 632.

18. If *oyer* is not delivered in time, defendant has as many days to plead after the rules are out, as he had when he demanded *oyer*. *Powel v. Guy*, 1 Stra. 705.

19. Defendant has as long time to plead after *oyer* given, as he had when *oyer* demanded. *Barnes*, 238. R. 5 & 6 G. 2. (b). 1 Stra. 705.

## Plea and Pleadings.

20. And if the plaintiff *amend* his declaration, the defendant shall have *two* days, exclusive of the day of amendment, to alter his first plea, or plead *de novo*. *Ibid.* And see *R. M.* 10 G. 2. *Reg.* 2. (b).

21. In an order to enlarge the time for pleading, the court of C. P. held, that the time was reckoned inclusive of the date of the order, but exclusive of the day when it expired. *Kay v. Whitehead.* 1 *H. Bl.* 35.

22. But in a subsequent case it appears that the officers of the court considered, that the first and last days are both to be reckoned inclusively. *Freeman v. Jackson*, 1 *Bos. & Pull.* 479.

16 Vin. 387. (F) What Plea may be pleaded, after Time to plead granted.

1. IF defendant, when under an order to plead *issuably*, puts in a plea which, though informal, goes to the substance of the action, the plaintiff cannot sign judgment as for want of a plea. *Thelluson v. Smith*, 5 *Term Rep.* 152.

2. If defendant has time to plead on the usual terms of pleading an *issuable* plea, &c. and pleads 23 *H. 6. c.* 10. (against sheriffs taking bonds *colore officii*, &c.) and that this bond was taken for ease and favour, &c. it is within the order, and judgment signed for want of plea shall be set aside with costs. *Dearden v. Holden*, 1 *Burr.* 605.

3. A plea in abatement is not an *issuable* plea within a judge's order of time to plead upon the usual terms. But a plea of tender is. *Kilwick v. Muidman*, 1 *Burr.* 59. *Barnes*, 263. 1 *Bos. & Pul.* 223.

4. Under a judge's order to plead *issuably*, the defendant can only put in a plea which goes to the merits. The plea of *alien enemy* is not such a plea. *Simeon v. Thompson*, 8 *Term Rep.* 71.

5. If defendant, being under an order to plead *issuably*, plead several pleas, one of which is not *issuable*, the plaintiff may sign judgment as for want of a plea, though the others be *issuable* pleas; for the plea which was pleaded in disobedience to the order vitiated all the others. *Waterfall v. Glode*, 3 *Term Rep.* 305.

6. Where a defendant, when under an order to plead *issuably*, put in a plea, though informal, which went to the substance of the action, the court held that the plaintiff could not sign judgment as for want of a plea. 5 *Term Rep.* 152.

7. In the case of *Rucker v. Hannay* (which over-ruled the case of *Studholme v. Hodgson*, 2 *Term Rep.* 390.) the court held that after a defendant has obtained an order for time to plead on the terms of pleading *issuably*, he may in such case plead the general issue, and the statute of limitations. 3 *Term Rep.* 124.

(H) Amendment, or Alteration of Pleas. In what 16 Vin. 389.  
Cases.

1. **T**HE court will, on special circumstances, give leave to withdraw a plea and plead another (as on a bond to withdraw *non est factum*), and plead the statute of gaming on payment of costs, taking short notice of trial, and giving judgment of the same term, if verdict for plaintiff. *Jefferies v. Walter*, 1 *Wils.* 177.

2. The court will, on circumstances, give leave, after general issue pleaded, to plead a special plea, which brings it on upon the merits; but not a plea that excludes the merits, as the statute of limitations. *Cox v. Rolt*, 2 *Wils.* 253.

3. Though a new count cannot be added to a declaration after the end of the second term, yet pleas, replications, &c. may be amended so long as the proceedings are on paper: thus, where the defendant in *trespass* pleaded two pleas, in *Hilary* term, and in *Trinity* term, after issue joined, obtained a rule to shew cause why he should not have leave to amend his two pleas, and to add a third plea; the rule was made absolute on payment of costs. *Waters v. Bovell*, B. R. 1 *Wils.* 223.

4. On false imprisonment, defendant having pleaded the general issue, may plead a justification, and the general issue on terms. *Taylor v. Joddrell*, 1 *Wils.* 254.

5. If defendant pleads the general issue, plaintiff demurs, and defendant joins, the court may give leave to withdraw his plea, and plead double. *Meard v. Phillips*, 2 *Stra.* 906. But *vide Law v. Law*, *ib.* 960.

6. Leave was given (after issue joined, and notice of trial given) to withdraw the general issue, and plead a special plea upon terms, and waving privilege of parliament. *Wilkes v. Wood*, 2 *Wils.* 204.

7. The defendant pleaded the general issue, but forgot to give notice at the same time of a set-off; and upon motion in time, the court gave leave to withdraw the plea, in order to deliver the same plea again with a proper notice of set-off. *Blackburne v. Mathias*, 2 *Stra.* 1267.

8. The court gave leave to withdraw the general issue, in order to bring money into court, and replead it (within the reason of the before cited case); not delaying the plaintiff. *Tarleton v. Wragg*, *Ibid.* 1271.

9. Debt upon a bond conditioned for payment of money at a future day. Defendant pleaded payment at the day; and before the plaintiff replied, moved to withdraw his plea and plead the stat. 5 *Ed.* 3. c. 16. against the sale of offices. *Sed per curiam*, This is never done, but in order to plead the general issue; not to substitute one special plea in the room of another. *Law v. Law*, 2 *Stra.* 960. *Vide Ambl.* 906. where the general issue was waved, and leave given to plead double.

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10. The defendant, having pleaded a judgment recovered, was ruled to abide by his plea, or to plead such plea as he would abide by; and on his afterwards pleading a special plea the plaintiff signed judgment, which the defendant moved to set aside for irregularity. *Shepherd*, against the rule, contended that the judgment was regularly signed for want of a plea, for that the defendant, after being ruled to plead such a plea as he would abide by, could not plead a special plea. *Mingay*, in support of the rule, insisted that the defendant was at liberty to plead specially; it might have been otherwise if the defendant had been ruled to plead issuably. But the Court discharged the rule. *Hare v. Lloyd*, 1 Term Rep. 693. *Prout v. Dewar*, *Ibid.* (n.) *Cockran v. Robertson*, *Ibid.* (n.)

11. The defendant may strike out a special plea, and plead the general issue, yet he cannot do so without leave of the court, nor can he do it after a sham plea. *Weald v. Needham*, 1 Wilf. 29, 2 Wilf. 369.

12. Plea of judgment recovered may be withdrawn, and *plene administravit* pleaded. *Barnes*, 330.

13. Plea of tender cannot be withdrawn to plead general issue. *Ibid.*

14. After *non assumpsit infra sex annos*, defendant may not add *non assumpsit*. *Barnes*, 332. 338.

15. Leave has been given to withdraw a plea of *non est factum*, and plead infancy. 1 Bl. 357.

16. If a special plea goes to the action, and plaintiff replies to the country, and has been delayed, the court will not give leave to withdraw and plead the general issue. *Freeman v. Jones*, 2 Wilf. 391.

36 Vin. 102.

## (I) Rules as to Pleadings.

1. **I**T is one of the rules of pleading, that the party justifying must shew and admit the fact. *Taylor v. Cole*, 3 Term Rep. 298.

2. It is a rule of pleading, that where a subject comprehends multiplicity of matter, there, in order to avoid prolixity, the law allows of general pleading. *Faulson v. Stuart*. Per Buller J. 1 Term Rep. 753. See the cases in illustration of this rule cited in 2 Saund. 410. (n. 4.)

3. Whatever is materially alleged, and not traversed, is admitted. *Nicholson v. Simpson*, 2 Stra. 297.

4. What is laid under a *scilicet* shall not vitiate. *Webb v. Turner*, Andr. 250. 2 Stra. 1095. S. C.

5. The party need not verify a negative. *Harvey v. Stokes*, Wille's Rep. 6.

6. Where the defendant pleads a matter of excuse, which admits a non-performance (except in the case of an award), the plaintiff need not assign a breach in his replication. *Shelly v. Wright*.

## Plea and Pleadings.

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*Wright, Willes' Rep.* 12. *Aliter* where the defendant pleads a performance.

7. A defendant must admit the trespass in order to justify it. *Rowe v. Tutte, Willes' Rep.* 15.

8. A defendant in trespass, who justifies under process of an inferior court, admits the trespass by pleading that he delivered the warrant to the officers, to whom it was directed, to be executed. *Ib.*

9. The facts pleaded in one plea can neither assist nor invalidate another plea on the same record. *Grills v. Mannell, Willes' Rep.* 380.

10. There is no such rule as that matter of law as well as matter of fact may not be put in issue to be tried by a jury, if complicated with matter of fact; for matter of law is put in issue in most issues. It may come in question upon *non est factum, non dimisit, devisavit vel non, feceravit vel non*; nay even upon *non assumpsit*, since infancy may be given in evidence on that issue. But the rule is, that a mere matter of law, or a consequence of law, cannot be put in issue by itself. *Per curiam. Dawes v. Papworth, Willes' Rep.* 410.

11. It is a rule in pleading, that the commencement of all particular estates must be shewn in pleading, unless in some cases where they are alleged as matter of inducement. *3 Wils.* 72.

12. It is a rule in pleading, that where the plaintiff replies new matter, he must conclude with an averment, that the defendant may have an opportunity of answering the new matter. *2 Wils.* 66.

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## Pledges.

[G]

(B) In what Actions (or Cases) they ought to be found. 16 Vin. 397.

1. BY the statute 4 & 5 *Anne*, for the amendment of the law, pledges are become mere matter of form, and may be found at any time before judgment. *Barnes*, 163. *How v. Denin*, *2 Wils.* 142. *3 Term Rep.* 157.

2. On special demurrer to action by bill, and for cause, *no pledges*; plaintiff may have leave to amend and add pledges. *Watson v. Richardson*, *1 Wils.* 226.



[A]

## Policy of Insurance.

16 Vin. 402.

### Of the Policy.

1. **POLICY** is the name given to the instrument by which the contract of indemnity is effected between the insurer and insured. *Park on Marine Insurance*, 1.

2. It is only signed by the underwriter or insurer, although certain conditions are to be performed by the person insured, or it is void. *Ibid.*

2 Burr.  
1171.

3. Two kinds of policies, *valued*; where the property insured is estimated at prime cost, at the time of effecting the policy—*Open*, where the value is not mentioned, but the prime cost must be proved at the trial. *Ibid.*

4. Policies when once underwritten cannot be altered. *Ibid.* *Henkle v. The Royal Exchange Assurance Company*, 1 Ves. 317.

5. But they may by consent of the parties, for *consensus tollit errorem*. *Ibid.* 3.

4 Vin Abr.  
281. S. C.

6. So where the policy stated that the adventure was to commence immediately from the departure of the ship from Fort St. George to London. The plaintiff brought a bill suggesting that the owner had employed the agent to insure the ship to commence from her arrival at Fort St. George, that a label agreeable to these instructions had been entered in a book and subscribed by the agent and two of the directors for the company. That the ship was lost after her arrival at Fort St. George, but before her departure for England, and the company refuse to pay, &c. Lord Hardwicke thought that this being a mistake of the clerks, the policy ought to be rectified by the label. *Motteux v. The Governor and Company of the London Assurance*, 1 Atk. 545.

7. The policy, when effected, becomes the property of the insured, who may maintain trover for it against the broker, or any other person, if it be wrongfully withheld. *Harding v. Carter*, *Sittings at Guildhall, East*. 1781. *Park*, 4.

What persons may be insurers.

Vid. 8 G. 1.  
c. 15. f. 25.

11 G. 1. c. 30. f. 43.

8. By 6 Geo. 1. c. 18. the king was authorised to grant charters to two distinct companies or corporations for the insurance of ships, goods, and merchandizes at sea, or going to sea, and for lending money on bottomrec.

9. By virtue of this regulation two offices under the names of *The Royal Exchange Assurance Office*, and *The London Assurance Office*, were created by charter 22d June, 6th of George 1.

10. After

10. After several clauses for the regulation of these corporations, sect. 12. prohibits any other society or partnership whatsoever from making insurances, declaring the policies void, and the sums underwritten forfeited, one half to his majesty, and the other to the informer. And if they lend money by way of bottomree, the bond or other security shall be void, and such agreement shall be adjudged to be an usurious contract, and the offenders shall suffer as in cases of usury.

11. But any private or particular person or persons shall be at liberty to underwrite any policy, &c. or may lend money by way of bottomree, as fully and beneficially as if this act had never been made, so that the same be not on account or risk of a corporation, body politic, or of persons acting in a society or partnership for that purpose.

12. Action by an underwriter against a broker to recover a sum of money received by him to plaintiff's use. A loss having happened upon a policy underwritten by plaintiff, he had paid; but one *B.* having agreed to take half the plaintiff's risk, he had paid his moiety into the hands of the defendant, to recover which the action was brought. Lord *Kenyon* C. J. thought this a partnership within the act, and that the plaintiff, being himself the underwriter, could not enforce such an illegal contract. But where a single name appeared on the policy, the insurer should never be allowed, if a loss happen, to defeat a *bonâ fide* insurance, by saying that there was a secret partnership. And afterwards he said, that the other judges in *B. R.* were of the same opinion. *Sullivan v. Greaves, Sittings after Easter 1789. Park.*

13. There are other clauses securing to the *South-Sea* and *East-India* Companies all the rights and privileges which they had enjoyed previous to the passing of that act, and the right of lending money on bottomree to the captains of their own ships. Sec. 24. 25. 28.

14. The most frequent subjects of insurance are ships, goods, merchandizes, the freight or hire of ships: also houses, warehouses, and the goods laid up in them from danger by fire, and insurance on lives. *Park, 9. Cites 1 Mogens, 4.* What things may be insured.

15. It is now established as the law and practice of merchants, that *respondentia* and bottomree must be specified and mentioned in the policy of insurance, and that under a general insurance on goods and merchandizes the party insured cannot recover money lent on bottomree. *Glover v. Black, 3 Burr. 1394. 1 Black. 405.*

16. But this case did not mean to determine that no special interest in goods could be given in evidence in other cases than those of *respondentia* and bottomree. *Per Lord Mansfield. Ibid. 3 Burr. 1401.*

17. The lien which a factor to whom a balance is due has upon the goods of his principal was admitted to be an interest capable of insurance, in *Godin v. London Assurance Company, 1 Burr. 489.*

18. Money expended by the captain for the use of the ship for which *respondentia* interest was charged, may be recovered under

an insurance on *goods, specie, and effects*. It being proved that there was an express usage in the *East-India* trade (upon a voyage in which the policy in question had been made,) that this kind of interest is always insured in this way. Which was held to distinguish it from the case of *Glover v. Black*. *Gregory v. Christie*, *B. R. Trin. 24 Geo. 3. Park, 11.*

19. By the marine regulations of most if not all of the trading powers in *Europe*, insurances upon the wages of seamen are forbidden. But this regulation is not meant to prevent mariners from insuring those wages which they are entitled to receive abroad, on goods which they have purchased therewith. *Park*, *Vid. 8 O. 1. c. 24 f. 7.* 12. cites *Magens*, 18, 19.

20. A policy against the loss of *Fort Marlborough* for the benefit of the governor is good. The place being only a factory, and the insured, though called a governor, being really but a merchant. *Carter v. Boehm*, 3 *Burr.* 1905. 1 *Black.* 593.

21. Insurances upon the ships or goods of enemies seem legal in this country, though prohibited on the continent. 1 *Ves.* 320, *Gift v. Mason*, *Sittings at Guildhall*, *Mich. 1785. Park, 14.*  
*Ord. of Stockholm, Bynker-Beck's Quest. Jur. Pub. lib. 1. c. 21. p. 153.*

22. It has been since decided by the unanimous decisions of the court of *B. R.* that a policy of insurance upon the goods of an alien enemy is illegal and void. *Brandon v. Nibbett*, 6 *Term Rep.* 23. *Bristow v. Towers*, *ibid.* 35. See also 33 *Geo. 3. c. 27. f. 4.*

23. By 25 *Geo. 2. c. 26.* no insurances shall be made on money lent on bottomree on foreign ships or goods bound to or from the *East Indies*, under the forfeiture of treble the sum insured or lent. But there is an exception in favour of the subjects of such sovereigns as carried on a trade with that part of the world previous to *October 1748*. This act was to have been in force seven years, and seems not to have been continued. *Park, 15.*

24. By 25 *Geo. 3. c. 44.* it shall not be lawful for any person or persons *who reside in Great Britain* to make or cause to be made any policy of insurance upon their interest in any ship, or any goods, merchandizes, or other property, without inserting in such policy *his, her, or their own name or names*, as the persons interested therein, *or the name or names of the person or persons who shall effect the same, as the agent or agents* of the person so really interested therein, or for whose use or benefit, or on whose account such policy or policies is or are underwrote: and that it shall not be lawful for any person or persons *who shall not live or reside in Great Britain* to make or cause to be made any policy of assurance upon their interest in any ship or ships, or any goods, merchandizes, or other property, without inserting in such policy the name of the agent or agents of the person or persons so really interested therein, and for whose use or benefit, or on whose account the same is so made and underwrote; and every policy made or underwrote contrary to the true intent and meaning hereof shall be null and void to all intents and purposes.

Of the requisites of a policy.  
 See *Cox et al. v. Parry*, 1 *Term Rep.* 44. in which it was held, that the executors could not recover because, amongst other grounds, the name of their testator was not inserted in the policy.

25. In an action on a policy of insurance on a ship and cargo from *Sunbury* in *Georgia* to *Amsterdam*, it appeared in evidence that the plaintiffs had been formerly owners of the vessel, and resided in *Georgia*, but they had transferred their property in her to one *Peirec*, living there also; subsequent to which the policy was underwritten. The names of the plaintiffs stood at the head of the policy, and the declaration stated that they had made it for the benefit of *Peirec*. The court were of opinion, that under the foregoing act when an agent effects a policy for his principal residing abroad, such agent's name should be inserted *eo nomine* as agent, and that this policy not having done so, it was void. They also inclined strongly, that by the act it is necessary that the agent should live in *England* when the principal resided abroad. *Pray et al. v. Edie*, 1 Term Rep. 313.

26. But by 28 Geo. 3. c. 56. that act is repealed, and it is declared, that it shall not be lawful for any person to make or effect, or cause to be made or effected, any policy of assurance on any ship, or upon any goods, merchandizes, or other property, without first inserting in such policy the name or names, or the usual stile and firm of dealing of one or more of the persons interested in such assurance; or without, instead thereof, first inserting the name or names, or the usual stile and firm of dealing of the person or persons residing in *Great Britain*, who shall receive the order for and effect such policy, or of the person or persons who shall give the order or directions to the agent or agents immediately employed to negotiate or effect such policy. Every policy made contrary to the true intent and meaning of this act to be null and void to all intents and purposes.

27. The husband of a ship has no right to insure for any part-owner without his particular direction: nor for all the owners in general, without their general direction, or something equivalent to it. *French v. Backhouse*, 5 Burr. 2727.

28. It seems necessary to insert the names of the ship and master in order to fix with precision the bottom on which the adventure is to be made. Though sometimes there are insurances generally "upon any ship or ships expected from a particular place." *Park*, 19.

The name  
of the ship  
and master.

29. Mr. *Park* seems to doubt whether if a different captain came in the ship from that whose name is mentioned in the policy, it would be therefore void, as the policy always contains the words, "or whoever else shall go for master in the said ship." *Ibid*.

30. In *Kewley v. Ryan*, 2 H. Black. 343. where a policy of insurance was on a cargo of cotton and other goods from *Grenada* or *London* put on board any ship or ships, the court of C. B. were unanimous that the assured had a right to cover by such policy whatever ship he thought proper that fell within the terms of it.

31. The owners of goods insured, by the act of shifting them from one ship to another do not preclude themselves from recovering

## Policy of Insurance.

vering an average loss arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned. *Plantamour v. Staples*, 1 Term Rep. 611.

32. It is absolutely necessary that it should be specified in the policy whether the insurance is made on the ships, goods, or merchandizes. But the practice seems unsettled as to specifying the particulars of goods by their marks, numbers, and packages, rather than including them under the general denomination of merchandize. *Park*, 20.

33. Underwriters are not answerable upon a general policy on goods, for goods lashed on deck, the captain's clothes, or the ship's provisions. But they must be specifically named, a policy on goods meaning only such goods as are merchantable, and a part of the cargo. *Ross v. Thwaite*, *Sittings after Hil.* 16 Geo. 3. at *Guildhall*, cor. *Ld. Mansfield*. *Park*, 21.

34. Action on a policy upon goods to London, "and till the same should be safely landed there." The owner of the goods brought down his own lighter, received them out of the ship, and before they reached land an accident happened, whereby the goods were damaged; a special jury, by direction of *Lee*, C. J. found that the insurer was discharged. *Sparrow v. Carruthers*, 2 Stra. 1236.

35. In *England* no express time for unloading is stipulated, but there must be no unreasonable delay, the estimation of which must always depend upon circumstances. *Park*, 23.

36. The underwriter is liable for a robbery of the goods when committed by thieves from without. *Harford v. Maynard*, cor. *Ld. Mansfield at Guildhall*, *Hil.* 1785. *Sed qu.* if for depredations committed by thieves in the vessel. *Vide Park*, 26.

37. Credit is given by the underwriters to the broker, and not to the assured, where the premium is not paid down at the time the assurance is made. *Airy & all Assignees of Milton v. Eland*, *Sittings at Guildhall*, cor. *Ld. Mansfield*, *Trin.* 14 Geo. 3. *Park*, 27.

38. By several statutes relating to the stamps, every policy of insurance, not exceeding one thousand pounds, must have a six shilling stamp, and if above that sum a stamp of eleven shillings. *Park*, 29. and the statutes there cited.

39. By 17 Geo. 3. c. 50. s. 17. every skin or piece of vellum or parchment on which any policy of insurance shall be written, whereby the property of one or more persons in houses or goods shall be insured to a greater amount in the whole than one thousand pounds, over and above the several duties already imposed, there shall be an additional duty of five shillings. This statute seems only to relate to insurances against fire.

Construction of the Policy.

ways be construed as nearly as possible attention of the contracting parties. 1 Burr. Park, 30.

the master of the ship, in the usual *assâ causâ*, although a loss happen he shall be answerable for. 1 Burr. 348.

a policy on the ship *Hope*, from *Hamburgh* to and till the ship shall have moored at anchor 24 hours in safety." In the course of the voyage the master committed a felony by smuggling. The ship arrived in safety at her moorings, and remained there 27 days, when she was seized by the revenue officers for this smuggling. The court of K. B. were of opinion, that this was a consequential damage for which the insurer was not liable, for if his liability be extended beyond the time limited in the policy, it would be impossible to lay down any fixed rule. *Lockyer & al. v. Offley*, 1 Term Rep. 252.

4. The *Succes* was insured "at and from *Leghorn* to the port of *London*, and till there moored 24 hours in good safety." She arrived on the 8th July, and was moored, but on the same day was served with an order to go back to the *Hope*, and perform a 14 days' quarantine. The men upon this deserted her, and on the 12th the captain petitioned to be excused going back. On the 28th the regency considered the petition and ordered her back. On the 30th she went back, performed the quarantine, and sent up for orders to air the goods, but before she returned she was burned on the 23d Aug. *Lee C. J.* held the insurer liable, for though the ship was so long at her moorings, she was not so in good safety, which must mean the opportunity of unloading and discharging. *Waples v. Eames*, 2 Stra. 1243.

5. In an insurance upon freight, if an accident happens to the ship before the goods are put on board, which prevents her sailing, the insured cannot recover the freight on the policy, for the plaintiff's right to it had not commenced. *Tongue v. Watts*. 2 Stra. 1251.

6. But if the policy be a valued policy, and part of the cargo be on board when such accident happens, the rest being ready to be shipped, the insured may recover to the whole amount. *Montgomery v. Eggington*, 3 Term Rep. 362.

7. On an insurance warranted to depart with convoy, the ship was taken in her way to the place where a convoy was appointed for that trade; *Lee C. J.* held the insurer liable. *Gordon v. Morely*, and *Campbell v. Bordieu*, 2 Stra. 1265.

8. Insurance on a ship from her arrival at *Fort St. George* till she should arrive at *London*. *Lord Hardwicke, Canc.* was of opinion that if she be in a bad condition, and goes to the nearest place

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place where she can be refitted, for that purpose it is the same as if she had been repaired at the very place whence the voyage was to commence, and no deviation to prevent the insured's recovering on the policy. *Motteux & al. v. The Governor and Company of London Assurance*, 1 *Atk.* 545.

9. The words of the policy "at and from Bengal to England," mean the first arrival at Bengal. *Per Hardwicke C. J.* 1 *Atk.* 548.

10. If an insurance be at and from a place, and the ship arrives at that place, the insurer is liable as long as the ship is preparing for the voyage upon which it is insured; but not if all thoughts of the voyage be laid aside. *Chitty v. Selwin*, 2 *Atk.* 349.

11. When a ship is to touch at several ports in the same island in order to deliver all her outward-bound cargo, the outward risk upon the ship ends, and the homeward risk commences 24 hours after her arrival in the first port to which she is destined; but the outward policy upon goods continue until they are landed. *Camden v. Cowley*, 1 *Black.* 417. *Barrafs v. The London Assurance Company. Sittings at Guildhall, Hill.* 1782. *Park*, 39.

12. Action on a policy of insurance "on goods from Malaga to Gibraltar, and at and from thence to England or Holland, beginning the adventure from the loading, and to continue until the ship and goods be arrived at either place, and there safely landed." The agreement was, "that upon the arrival of the ship at Gibraltar, the goods might be unloaded and reshipped in one or more British ships for England and Holland." When the ship came to Gibraltar, the goods were unloaded and put into a storeship, (which it was proved was always considered as a warehouse,) and that there was then no British ship there. Two days after the storeship and goods were lost in a storm. *Lee C. J.* held the insurer liable; for the construction of the policy should be according to the course of trade in the place, and this was the usual mode of shipping and re-shipping in that place, and the court of K. B. refused a new trial. *Wright J. dissentiente. Tiernay v. Etherington*, cited 1 *Burr.* 348.

13. Policy of insurance on an *East India* ship, its body, tackle, apparel and other furniture, against perils of the seas, men of war, fire, &c. at and from London to any ports and places beyond the Cape of Good Hope and back to London. At Canton the ship stayed to clean and refit. In order to which, all the sails and furniture were taken out of the ship, and put into a warehouse built for that purpose on a sand bank in the river there, where they were accidentally burnt. This was proved to be the well-known and established usage for all *European* ships going that voyage, to be prudent, and for the general benefit of all concerned. The insurers are liable, for this is a loss within the voyage, though it happened, strictly speaking, upon land, and is within the words and meaning of the policy. *Pelly v. The Royal Exchange Assurance Company*, 1 *Burr.* 341.

14. Had it been an accidental necessity of refitting, the master might have justified taking them out of the ship, even if it had not been the usage of ships going that voyage. *Per Lord Mansfield. Ib.*

15. Insurance upon ships to the port or ports of discharge at *Labrador*, with leave to touch at *Newfoundland* "on the ships till they should be arrived, and should have moored at anchor 24 hours, and on the goods until the same should be there discharged and safely landed." One of the ships arrived on the 22d June, and the other on the 14th July, from which time the crews were employed in fishing, and had taken out none of their cargoes, except such things as they immediately wanted, at leisure hours. On the 13th Aug. the vessels were taken by an *American* privateer. In an action on the policy to recover the value of the goods, it being proved to be the usage of the trade both at *Labrador* and *Newfoundland* to keep the goods on board for several months, the court held the underwriter liable, for he is bound to know the nature and peculiar circumstances of the branch of trade to which the policy relates. *Noble v. Kennoway, Doug. 492.*

16. A policy upon an *East India* ship includes the chance of its being detained in *India*, and the risk of the country voyages she is employed in there, this being the known usage of that trade. *Salvador v. Hopkins, 3 Burr. 1707. Gregory v. Christie, B. R. Trin. 24 G. 3. Park, 49. Farquarson v. Hunter, B. R. Hil. 25 G. 3. Park, 50.*

17. In the two first cases these words were in the policy, "to any ports or places whatsoever;" and in the last the words were, "with liberty to touch and stay at any port or place in this voyage."

18. But the parties may, by their agreement, prevent the construction being extended so far as the usage would carry it, and it is not necessary that express words of exclusion should be used, if the court can collect from the terms used, that the intention was such. *Park, 51.*

19. Thus in an action upon a policy "at and from *Port L'Orient* to *Pondicherry, Madras, and China*, and at and from thence back to the ship's ports of discharge in *France*, with liberty to touch in the outward or homeward-bound voyage at the isles of *France* and *Bourbon*, and at all or any other place or places what or wheresoever," with a subsequent clause, "that it shall be lawful for the said ship in this voyage to proceed and sail, to touch and stay at any ports or places whatsoever, as well on this side, as on the other side of the *Cape of Good Hope*, without being deemed a deviation." The ship arrived at *Pondicherry*, and then sailed for *Bengal* instead of going to *China*, and having wintered there returned to *P.* and was taken in her voyage back to *L'Orient*. Lord Mansfield held the voyage to *Bengal* not to be insured, notwithstanding the general words of the policy; for the expressions "in the outward or homeward bound voyage," and "in this voyage," restrained them to mean, all places whatsoever in



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the usual course of the voyage, "to and from the places mentioned in the policy." *Lavabre v. Wilson*, Dougl. 284.

20. Where there is an insurance on the ship, which by stress of weather is detained on her voyage in order to refit, sailors' wages and provisions expended during that time cannot be allowed as a charge against the underwriter. *Fletcher & al. v. Poole*. *Sittings at Guildhall, East*. 1769. cor. *Ld. Mansfield. Park*, 53.

21. In an action on a policy of insurance on goods, the ship was taken during her voyage, condemned, and sold, but on appeal the decree was reversed, and the ship and cargo decreed to be restored, and the amount of the sale was accordingly paid; freight paid to the owner of the ship *pro rata itineris* cannot be recovered from the underwriter. *Baillie v. Moudigliani*, *H.* 25 *G.* 3. *Park*, 53.

22. So upon a policy on the ship and goods, the expences incurred by wages, provisions, demurrage, &c. during a detention in consequence of an embargo are not recoverable. *Eden v. Poole*, *Sittings after Hill*. 1785. *Park*, 54. *Vide also Robertson v. Ewer*, 1 *Term Rep.* 127.

23. Action on a policy on an *East India* and *China* ship, and on the tackle, ordnance, ammunition, artillery, and furniture of the ship. While the ship was in the river *Canton* it became necessary to refit her, for which purpose the stores and provisions, (which were merely for the ship's crew,) were put into a warehouse, where they were destroyed by accidental fire. The court of King's Bench were of opinion that these provisions were comprehended under the word "furniture," and protected by the policy: that this case differed from that of *Robertson* and *Ewer*, for there the provisions were consumed by the slaves on board during the detention of the ship. *Brough v. Whitmore*, 4 *Term Rep.* 206.

24. In a policy of insurance on a slave ship, which was otherwise in the common form, there was a memorandum "that the assurers were not to pay any loss that may happen in boats during the voyage, (mortality by natural death excepted,) and not to pay for mortality by mutiny, unless the same amount to 10 per cent." There happened a mutiny among the negroes, in consequence of which the ship's crew were obliged to fire upon them. Some were killed in the fray: these Lord *Mansfield* thought within the policy; as he did also others who died of their wounds. Others being baffled in their attempts, in despair starved themselves to death: these he thought not within it. Others received some hurt by the mutiny, but not mortal, and died afterwards of other causes, as from having jumped overboard and swallowed sea water. This he said was the great point which he left to the jury, who found the insurer not liable for those who died by means of these two last causes. *Jones v. Schmoll*, *Guildhall, Trin.* 1785. 1 *Term Rep.* 130.

In this case it was stated, that the mutiny had lessened the price of the remaining slaves.

But Lord M. thought this a remote consequence not insured against by the policy.

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25. Policy of insurance "at and from *Liverpool* to *Antigua*, with liberty to cruise six weeks, and to return to *Ireland*, or *Falmouth*, or *Milford*, with any prize or prizes," means six weeks successively from the commencement of the cruise. *Syers & al. v. Bridge*, Dougl. 509.

26. If an armed force board a ship, and take part of the cargo, the underwriters are not liable on a count in the declaration stating the loss to be by a seizure by people to the plaintiffs unknown; for the word "people" in the policy means the governing power in the country. *Nesbitt & al. v. Lufbington*, 4 Term Rep. 783.

## Of Losses by Perils of the Sea.

1. ACTION upon a policy of insurance for the value of certain slaves. The declaration stated, that by perils of the sea, contrary winds, &c. the voyage was so much retarded, that a sufficient quantity of water did not remain for the support of the slaves and other people on board, and that certain slaves perished for want of water. On the evidence it appeared that the ship being bound to *Jamaica* missed the island, and the crew being reduced to great distress for want of water, it was agreed that some of the slaves should be thrown overboard to preserve the rest. The court thought this to be loss in consequence of the mistake of the captain, and not by the perils of the sea, and granted a new trial. *Gregson v. Gilbert*, B. R. East. 23 G. 3. *Park*, 62.

2. When a ship is missing, and no intelligence received of her within a reasonable time after she failed, it shall be presumed that she has foundered at sea. *Green v. Brown*, 2 Stra. 1199. *Newby v. Read*, *Sittings*, Mich. 3 G. 3. *Park*, 63.

3. It is the practice in *England*, that if a ship bound to any port in *Europe* be not heard of for six months, she is to be deemed lost, and the insurers are to pay, or if bound for a greater distance, if not heard of in twelve. *Park*, 64.

## Of Losses by Capture and Detention of Princes.

1. CAPTURE, as applied to the subjects of marine insurances, is the taking of the ships or goods belonging to the subjects of one country by those of another, when in a state of public war. *Park*, 66.

2. The ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy. The insurer runs the risk of the insured, and must bear the loss actually sustained. If after condemnation the owner recovers her, the insurer must pay salvage or any other expence sustained in getting her back. *Goss v. Withers*, 2 Burr. 696.

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3. No capture of the enemy can be so total a loss as to leave no possibility of recovery. But this chance does not suspend the demand for a total loss upon the insurer, and justice is done by putting him in place of the insured in case of a re-capture.

4. Action on a policy of insurance. The ship had been captured on an illegal ground; "that she being a neutral vessel, her cargo, consisting of the produce of an enemy's country, was put on board at a neutral port from barks coming immediately from the hostile port, without the goods having been landed." There had been a condemnation in the admiralty court, and an appeal to the lords commissioners of prizes. The market being high, the cargo in part perishable, and the cause likely to be delayed, the agent of the owners agreed to give the captors a sum certain, with costs, for their consent to a decree of reversal. Lord Mansfield held the insurers liable to answer this average loss, which was submitted to *bonâ fide* in order to avoid a total one. *Berens v. Rucker*, 1 Black. 313.

5. The insured may abandon in case merely of an arrest or embargo by a prince not an enemy. *Per Lord Mansfield in Goss v. Withers*, 2 Burr. 696.

6. The detention by people insured against in the policy means the ruling power in the country, and not the individuals of a nation, as opposed to magistrates or rulers. *Nesbitt & al. v. Lushington*, 4 Term Rep. 783.

7. In case of detention by a foreign power, which in time of war may have seized a neutral ship at sea, and carried her into port to be searched for enemy's property, all the charges consequent thereon must be borne by the underwriters, and whatever costs may arise from an improper detention must always fall upon them. *Park*, 79. cites 1 *Magers*, 67. *Salucci v. Johnson*, B. R. Hil. 25 Geo. 3.

Vid. 16 Vin.  
pl. 41. p.  
411.

8. Where a damage arose from the detention or seizure of ships by the government of the country to which they belong, it seems not to have been doubted in *Robertson v. Ewer* that the insurer is liable for it. *Park*, 81. 1 Term Rep. 127. And in *Rotch v. Edie*, 6 Term Rep. 413. it was so decided in B. R.

## Of Losses by the Barratry of the Master or Mariners.

Cites 1 Stra.  
551. a Stra.  
1173. Cowp.  
143. 1 Term  
Rep. 323.

1. ANY act of the master or of the mariners which is of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners of the ship, without their consent or privity, is barratry. *Park*, 83.

2. It is not necessary to entitle the insured to recover for barratry, that the loss should happen in the act of barratry, but it is immaterial whether it take place during the fraudulent voyage, or after the ship has returned to the regular course. *Per Lord Mansfield, Vallejo v. Wheeler*, Cowp. 155.

3. But

3. But the loss in consequence of the barratry must happen *during the voyage insured, and within the time limited by the policy, or the underwriters are discharged.* *Lockyer v. Offley*, 1 Term Rep. 252.

4. A ship being advertised to go to *Marfeilles*, goods were shipped on board her on behalf of the plaintiff, and the master signed a bill of lading, whereby he undertook to go strait thither. The defendant underwrote a policy from *Palmouth* (the place where the goods were taken in) thither. Before the ship departed from *London* another advertisement was published for goods to *Genoa, &c.* and the plaintiff's agent was told that it was intended to go to these ports first, and then to come back to *Marfeilles*. But he insisted that his bargain was to go directly to *Marfeilles*, and would not consent to let her pass by it, or alter his insurance. The ship did pass by it, and on her return for *M.* was blown up in an engagement with a *Spanish* ship. In an action on the policy, the breach assigned was a loss by the barratry of the master. But the court of K. B. were of opinion that this was not barratry; for the master acted consistent with his duty to his owners, and the plaintiff's agent knew of the intended alteration before the goods were put on board, and might have refused to ship them, or altered the insurance. *Stamma v. Brown*, 2 Str. 1173.

5. A merchant ship with a letter of marque being insured, the captain received orders from the owners, that if he took a prize he should put some hands on board, and send her back, and proceed himself with the merchants' goods to the port of delivery. He took a prize, and was proceeding to obey his orders, but his crew forced him to go back, though he acquainted them with his directions, and on his return he was captured. In an action on the policy, *Lee*, C. J. held this not to amount to barratry, as the ship was not run away with in order to defraud the owners. But as it was a deviation through necessity, he held the insurers to be answerable. *Elton v. Brogden*, 2 Stra. 1264.

6. If *A.* be the owner of a ship, and let it out to freight to *B.*, who insures it for the voyage, and the captain afterwards deviates for his own benefit with the knowledge of *A.*, but not of *B.*, it is barratry, for it is a cheat and fraud on *B.*, who is the owner *pro hac vice*, and he shall recover against the insurer any loss sustained in consequence of this deviation. *Vallejo & al. v. Wheeler*, Corup. 143.

7. The breach of an embargo is an act of barratry in the master. *Per Buller, J.* *Robertson v. Ewer*, ante.

8. If a deviation be with the privity or consent of the owners of the ship; it is not barratry. *Vallejo & al. v. Wheeler*, Corup. 143.

9. Fraudulent acts of the captain done without the consent of the owners of the goods, but with the consent of the owners of the ship, are not barratry, so as to charge the underwriters. For barratry must partake of something criminal, and be committed *against the owner*, by the master or mariners, and cannot be committed

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against him with his consent. *Nutt & al. v. Bourdieu*, 1 *Term Rep.* 323.

10. Where the captain and owner of a ship had mortgaged her for a sum of money, and the mortgagee had insured her from *London* to *Marseilles*, and from thence to a port in *Holland*: the master sailed to *Marseilles*, and instead of pursuing his voyage from thence, went to the *West Indies*, where he sold the ship. The mortgagee brought his action at law upon the policy against the insurer for the damages. The latter filed a bill in Chancery, praying an injunction on the ground that the mortgagor was to be considered as the owner of the ship in equity, and that the owner of the ship could not be guilty of a barratry; and Lord *Hardwicke* granted it. *Lewin v. Suasso*. *Park*, 94.

11. If the parties insert in the policy the words *in any lawful trade*, if the captain commit barratry by smuggling, the underwriters are answerable; for otherwise the word barratry should be struck out of the policy. And the stipulation respecting the employment of the ship in a lawful trade, means the *trade* on which she is sent by the owners. *Havelock v. Hancil*, upon demurrer, 3 *Term Rep.* 277.

12. The voyage insured was from *Jamaica* to *New Orleans*, which lies up the river *Mississippi*, and the captain proceeded on his voyage as far as the mouth of that river, and then dropped anchor, and went up the river in his boat for a fraudulent purpose of his own. The court of K. B. held, that the dropping anchor with such fraudulent intent was an act of barratry, and not merely a deviation. *Ross v. Hunter*, 4 *Term Rep.* 33.

13. If the captain of a ship, contrary to his owner's instructions, cruize for and take a prize, and the vessel is afterwards lost in consequence, he is guilty of barratry, though a libel be brought for prize in the court of Admiralty in the name of himself and owner, and though the owner had procured a letter of marque solely with a view to encourage seamen to enter, and without any intention of using it for the purposes of cruising; for whatever is done by the captain to defeat or delay his performance of the voyage, is barratry in him, it being to the prejudice of his owners; and though the captain might conceive that it was for their benefit, yet it was barratry, as he acted contrary to his duty, *Moss v. Byrom*, 6 *Term Rep.* 379.

## Of Partial Losses, and of Adjustment.

1. **PARTIAL** loss is a damage which the ship may have sustained in the course of the voyage from any of the perils mentioned in the policy. It also means any damage which the cargo may have received without any fault of the master, by storm, stranding, capture, or shipwreck, although the whole or the greater part thereof may arrive in the port. *Park*, 101.

2. These

2. These partial losses fall upon the owners of the property so damaged, who must be indemnified by the underwriter. *Ibid.* 2 Burr. 1172.

3. The underwriters of London declare by a memorandum at the foot of their policy, that they will not answer for partial losses not amounting to 3 per cent. *Ibid.*

4. But they undertake to indemnify against losses, however inconsiderable, which arise from a general average. *Ibid.*

5. It is not fully explained in what cases and in what manner the damage arising from a partial loss shall be deemed to exceed 3 per cent. Thus, if a merchant has shipped 101 chests of goods, of which on arrival 3 chests are by some accident so spoiled as to be worth nothing; if the damage be calculated as on the whole value of 101 chests, it will not exceed 3 per cent.; and it is thought by most insurers not to be recoverable in such a case by the insured, especially if the insurance be made without expressly declaring in the policy the particular sum insured on each chest.

1 Magens, 73. Park, 102.

Vid. Nesbitt

v. Lushington, 4 Term Rep. 786, 788.

6. Action on a policy upon goods, consisting of sugars, coffee, and indigo, which were valued in the policy, the sugars at 30*l.* per hoghead. The sugars warranted free from average (that is, partial loss) under 5*l.* per cent., and all other goods free from average under 3*l.* per cent., unless general, or the ship be stranded. When the ship arrived at her port of delivery, it appeared that every hoghead of sugar was damaged. This made it necessary to sell them immediately. When the difference between the price they brought on account of the damage, and that which they might have been sold for there, if they had been sound, was as 20*l.* 8*d.* per hoghead to 23*l.* 7*s.* 8*d.* per hoghead. The question was, by what measure the damages under all the circumstances of the case ought to be estimated. The court of B. R. were of opinion, that the rule of estimating the loss upon a valued policy was, that the insurer shall pay to the insured the like proportion of the sum at which the goods are valued in the policy, as the price of the damaged goods bear to the price of the same goods, had they arrived undamaged at the port of delivery, when they are landed there. And this proportion is equally the rule, whether the goods come to a rising or a falling market. Thus if the value in the policy be 30*l.* the goods are damaged, but sell for 40*l.*; if they had been sound they would have sold for 50*l.*; the difference between the sound and the damaged is a fifth, consequently the insurer must pay a fifth of the value in the policy, or 6*l.*, and so *converso* if they come to a falling market. *Lewis & al. v. Rucker*, 2 Burr. 1167.

7. The insurer has nothing to do with the rise or fall of the market, or with the speculations of the merchant; he is only to put him in the same condition (relation being had to the prime cost or value in the policy) as he would have been in if the goods had arrived free from damage: which duty accrues upon the

ship's arrival and landing her cargo at the port of delivery,  
2 Burr. 1167.

8. Since 19 G. 2. the constant usage has been to let the valuation, fixed in the policy, remain in case of a total loss, unless the defendant can shew, that the plaintiff had a colourable interest only, or that he has greatly over-valued the goods; but a partial loss opens the policy. *Park*, 111. cites *Erasmus v. Banks*. *Smith v. Flenny*, M. 21 G. 2.

9. Where no valuation is stated in the policy, the invoice of the cost, with the addition of all charges and the premium of insurance, shall be the foundation upon which the loss is to be computed. *Park*, 104. *Dick et al. v. Allen*, *Guildhall*, Mich. 1785. *car. Buller*, J.

10. The underwriters of London have, by words inserted in their policy, declared that they will not be answerable for any partial loss happening to corn, fish, salt, fruit, flour, and seed, unless it arise by way of a general average, or in consequence of the ship's being stranded. These last words are left out by the two chartered assurance companies. *Park*, 112.

*Cantillon v. The London Assur. Comp.* cited 3 Burr. 1553.

11. "Corn" is a general word, and includes many particulars, as peas and beans. *Mason v. Shurray*, *Park*, 112.

12. The term "Salt," does not include saltpetre. *Per Wilson*, J. *Journu v. Bourdieu*. Sittings in C. B. *East*. 27 G. 3. *Park*, 113.

13. Action on a policy of insurance upon a cargo of wheat, being in the common form, and with the usual clause, "that corn, &c. should be warranted free from average unless general, or the ship be stranded." The ship was greatly damaged by a violent storm, and obliged to run to the first port to visit, the expences of which the insurer paid as being a general average. The wheat had been damaged by the storm, and the action was brought against the insurer to recover the amount of this damage. It was argued for the plaintiff, that this warranty ought only to take place if neither of the two specified events should happen. But if either did happen, (as was the case here, there being a general average loss,) then the warranty to be free from average was thereby discharged, and left the insurer liable to all other average. But the court were of opinion that "unless" meant the same as *except*, and could not be construed as a condition in the sense contended for by the plaintiff. *Wilson v. Smith*, 3 Burr. 1550.

14. So where a cargo of fish was so damaged by a storm as to be rendered of no value, and there was also a general average loss; the court were of opinion, that the insurer engaged only against a total loss, unless the ship be stranded; that a total loss of the thing insured was the *absolute destruction of it* by the wreck of the ship; that if the fish came to port, though stinking, yet as the commodity specifically remained, the underwriter was discharged. *Cocking v. Frazer*, B. R. *East*. 25 G. 3. *Park*, 115.

15. Action

15. Action on a policy of insurance on goods (containing such an exceptive clause) to recover for a total loss. The cargo was peas, which arrived at the port of destination, but so damaged that the produce of them was three-fourths less than the freight due. It was proved at the trial to be the usage, that if the specific thing came to the market, although a loss happened amounting to a total one, yet the underwriter was held discharged. Lord *Mansfield* held that the usage explained the general words in the memorandum, and that every man, who contracts for a policy, does it as if the point of usage were inserted in his contract in terms; and there was a verdict for the defendant. *Mason v. Shurray*, Hil. 1780. at Guildhall. Park, 116.

*Boyfield v. Brown*, 2 Stra. 1065, is *contra*, but that case was decided prior to the insertion of

this memorandum in the policy. 1b.

### Of general or gross Average,

1. ALL losses sustained and expences incurred voluntarily and deliberately with a view to prevent a total loss of the ship and cargo ought to be brought into a general or gross average, in which all who are concerned in ship, freight, and cargo are to bear an equal or proportionable part, and it must be made good by the insurers in such proportions as they have underwritten. *Park*, 122-124.

*Roccus de Assurac-tionibus*. Not. 6s.

2. Cutting away masts, or throwing overboard goods in a storm to lighten the vessel, damages sustained by those on board from such jettison, damages sustained in defending a ship against an enemy or pirate, the expence of curing the men wounded in such defence, and the sum the master may have promised to pay to a privateer or pirate to ransom his ship when taken, and the like, are general average losses. *Ibid*.

3. There can be no contribution without the ejection of some goods and the saving of others. But it is not always necessary for that purpose that the ship shall arrive at the port of destination. *Ib*. 123.

4. If the jettison does not save the ship, there shall be no contribution of such goods as may happen to be saved. But if the ship be once preserved by such means, and, continuing her course, be afterwards lost, the property saved from the second accident shall contribute to the loss sustained by those whose goods were cast out upon the former occasion. *Ib*. 123.

Ord. Law. 14. tit. Con-tribution, Art. 15, 16. Ord. of Hamb. 2. s. Mag. 240.

Ord. of Rotterdam, 2 Magens, 98. Writers on insurance are not perfectly agreed on this point. *Vid*. 3 Magens, 56.

5. Sailors' wages and victuals, while a ship is performing quarantine, unless it be an extraordinary one, shall not be brought into a general average. *Ib*. 125.

6. Though the charges of unloading a ship, in order to get her into a river or port, ought not to be brought into a general average, yet they may when occasioned by an indispensable necessity



sity to prevent the loss of the ship and cargo. As when a ship is forced by storm to enter a port to repair the damage she has suffered, if she cannot continue her voyage without an apparent risk of being lost; the wages and victuals of the crew are brought into an average from the day it was resolved to seek a port to refit the vessel to the day of her departure from it, with all the charges of unloading, reloading, anchorage, pilotage, and every other expence incurred by this necessity. *Beawes*, 150. quoted by *Buller*, J. in *Da Costa v. Newenham*, 2 Term Rep. 407. *Laterward v. Curling*, Park, 125.

Of the adjustment.

7. When the quantity of damage sustained in the voyage is known, and the amount which each underwriter upon the policy is liable to pay is settled, it is usual for the underwriter to indorse on the policy "*adjusted this loss at so much per cent.*" or words to that effect. This is called an adjustment. *Park*, 117.

8. If he refuse to pay after this, the owner has no occasion to go into the proof of his loss, or any of the circumstances respecting it. *Ibid.*

9. Action on a policy of insurance. A loss having happened, the defendant, who was the insurer, had settled the amount, and underwrote the policy in these words: "Adjusted the loss on this policy at ninety-eight pounds *per cent.*, which I do agree to pay one month after date." This he signed with his name. When the note became due, the defendant insisted on fuller proof of the warranty annexed to the policy being complied with. At the trial *Lee C. J.* was of opinion, that this was to be considered as a note of hand, and that the plaintiff had no occasion to enter into the proof of the loss, and he had a verdict thereupon. *Hog v. Gouldney*, at Guildhall, Trin. 1745. *Beawes Lex Merc.* 310. *Hewit v. Flexney*, S.P. *ibid.* 308.

10. Action on a policy on a foreign ship, in which there was a stipulation "that the policy shall be sufficient proof of interest;" and judgment by default. On a motion to set aside the writ of inquiry executed thereon, the court of K. B. were of opinion, that the underwriter having suffered judgment to go by default, had confessed the plaintiff's title to recover, and the amount of the loss being fixed by his own stipulation in the policy, the defendant needed only to prove the plaintiff's subscription to the policy to the jury. *The Hylfson v. Fletcher*, Dougl. 301.

11. If an insurer pay money for a total loss, and in fact it be so at the time of the adjustment, and if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured. *Da Costa v. Firth*, 4 Burr. 1996.

12. An armed force boarded a ship, in consequence of which she was stranded: the principal part of her cargo, consisting of corn, was taken by the mob at their own price. This loss cannot be recovered as for a general average; but for such part as was damaged in consequence of the stranding, and thrown overboard, the insurer may recover upon a count stating the loss to be by stranding. *Nesbitt & al. v. Lushington*, 4 Term Rep. 783.

13. Where

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13. Where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average. *Da Costa v. Newenham*, 2 Term Rep. 407.

14. The most valuable goods, though their weight should be incapable of putting the ship in the least hazard, as diamonds, &c., must be valued at their just price to this contribution. *Peters v. Milligan*, at G. Hall, Mich. 1787. cor. Buller, J. *Park*, 129.

15. Neither the persons of those in the ship, nor the ship provisions, nor *respondentia* bonds, nor wearing apparel in chests and boxes, nor such jewels as belong to the person, nor the wages of sailors, are to contribute to the general loss. *Ibid.* 127.

16. The ship, freight, and cargo are by custom in *England* to bear an equal and proportional part of the loss arising from what is thus sacrificed for the common good. *Park*, 127. *Da Costa v. Newenham*, 2 Term Rep. 407.

17. The way of fixing a right sum by which the average ought to be computed, is by examining what the whole ship, freight, and cargo, if no jettison had been made, would have produced neat if they had been sold for ready money. And this is the sum whereon the contribution should be made, all the particular goods bearing their net proportion. 1 Mag. 69.

18. In *England*, the custom has become general of estimating the goods saved and lost at the price for which the goods saved were sold. *Park*, 128.

19. The contribution is in general not made till the ship arrive at the place of delivery; but accidents may happen which may cause a contribution before she reach her destined port: as when a vessel has been obliged to make a jettison, or by damages suffered soon after sailing is obliged to return to her port of discharge. The expences arising from hence may be then settled by a general average. *Park*, 129.

## Of Salvage.

1. SALVAGE is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates, or enemies. *Beaumes Lex Merc.* 146.

It is also sometimes used to signify the thing itself which is saved. *Ib.*

2. In an action of trover, brought for goods which were in a ship which took fire, the defendants refusing to deliver them up until they were paid salvage, *Holt C. J.* was of opinion, that the defendants might retain them until salvage was paid, as well as a taylor, hostler, or common carrier their respective articles. *Hartfort v. Jones*, 1 Ld. Raym. 393. 2 Salk. 654.

3. In

Made perpetual 4 G.  
7. c. 12.

3. In cases of wreck, 12 *Ann. stat.* 2. c. 18. does not fix the rate of salvage, but ordains that it shall be *reasonable*; that is, it must be a sufficient recompence to those who have encountered dangers for the preservation of the ship and cargo, regard being at the same time had to the circumstances of the owner of the property saved, and it is to be ascertained by three justices of peace. *Park*, 135.

Sec. 5.

4. By 26 G. 2. c. 18. Any person not employed by the master, &c. in the salvage of a ship, &c. and saving them in the absence of those so employed, or giving information to a justice of peace, magistrate, customhouse or excise officer, where any goods or effects belonging to a vessel wrecked, &c. are wrongfully bought and sold, or concealed, then such person or persons shall be entitled to a *reasonable reward for such services*, to be paid by the masters or owners, and to be adjusted in case of a disagreement about the *quantum*, in like manner as the salvage is to be adjusted by 12 *Ann.*

*Stat.* 6. "And for the better ascertaining the salvage to be paid in pursuance of the present act, and the act before-mentioned, and for the more effectual putting the said acts in execution, the justice of the peace, mayor, bailiff, collector of the customs, or chief constable, who shall be nearest the place where any ship, goods, or effects, shall be stranded, or cast away, shall forthwith give public notice, for a meeting to be held as soon as possible, of the sheriff or his deputy, the justices of the peace, mayors or other chief magistrates of towns corporate, coroners, or commissioners of the land tax, or any five or more of them, who are hereby empowered and required to give aid in the execution of this and the said former act, and to employ proper persons for the saving of ships in distress, and such ships, vessels, and effects as shall be stranded or cast away; and also to examine persons upon oath touching or concerning the same, or the salvage thereof, and to adjust the *quantum* of such salvage, and distribute the same among the persons concerned in such salvage, in case of disagreement among the parties, or the said persons; and that every such magistrate, &c. attending and acting at such meeting, shall be paid four shillings a-day for his expences in such attendance, out of the goods and effects saved by their care or direction."

5. "Provided, that if the charges and rewards for salvage, directed to be paid by the former statute and by this act, shall not be fully paid, or sufficient security given for the same, within 40 days next after the said services performed, then it shall be lawful for the officer of the customs concerned in such salvage, to borrow or raise so much money, as shall be sufficient to satisfy and pay such charges and rewards, or any part thereof then remaining unpaid, or not secured as aforesaid, by or upon one or more bill or bills of sale, under his hand and seal, of the ship or vessel or cargo saved, or such part thereof as shall be sufficient, redeemable upon payment of the principal sum borrowed, and interest for the same at the rate of 4 *per cent. per annum*."

6. The

6. The act makes further provision as to the persons who are to put it in execution. *Sett. 9 & 10.*

7. It punishes with transportation for seven years any person assaulting a magistrate or officer when in the exercise of his duty respecting the preservation of any ship, &c. *Sett. 11 & 12.*

8. In case of a capture of any ship, boat, or any goods therein, which shall be proved in the court of Admiralty to belong to any of his majesty's subjects of any territories continuing under his protection and obedience, by any of his majesty's enemies, and they be again retaken, every ship, &c. and every part thereof belonging to such subject, shall by decree of the court of Admiralty, be restored to the former owner, he paying in lieu of salvage, if taken by one of his majesty's ships of war, an eighth part of the true value of the ships, vessels, boats, and goods so to be restored; if taken by a privateer or other vessel, after having been in the possession of the enemy twenty-four hours, one eighth part of the true value; if above twenty-four hours and under forty-eight, a fifth part thereof; if above forty-eight hours and under ninety-six, a third part thereof; and if above ninety-six hours, a moiety thereof. And if such ship so retaken shall appear to have been, after the taking by the enemy, by them set forth as a man of war, the former owners to whom it is to be restored, shall pay for salvage the full moiety of the true value of the said ship so taken, without deduction. *13 G. 2. c. 4. sect. 18. 29 G. 2. c. 34. s. 24.*

9. The wearing apparel of the master, and seamen are always excepted from the allowance of salvage. *Beawes Lex Merc. 147.*

10. The valuation of the ship, in order to ascertain the rate of salvage, may be determined by the policy of insurance, if there be no reason to suspect she is undervalued; and the same rule may be observed as to goods where there are policies upon them. If that however should not be the case, the salvors have a right to insist upon proof of the real value, which may be done by the merchant's invoices, and they are to be paid accordingly. *Beawes, 147. Park, 140.*

11. The insurers, by their contract, expressly agree to indemnify the insured against the charges of salvage. *Ib.*

12. Action on a policy of insurance insuring goods on the ship *A*. The plaintiffs declared, that the ship sprung a leak and sunk in the river, whereby the goods were spoiled; the evidence was, that many of the goods were spoiled; but some were saved. The question was, Whether the plaintiffs might give in evidence the expences of salvage; that not being particularly stated in the declaration, as a breach of the policy, and held by Lord Hardwick that they might. For the insurance is against all accidents, and the accident laid is, that the ship sunk in the river, and it lays a special damage besides, that the goods were spoiled, but it is a common case that the plaintiff may give in evidence any damage that is within his cause of action notwithstanding. *Carey v. King, Cases in B. R. Temp. Hardw. 304.*

## Policy of Insurance.

13. The insured is only entitled to an indemnity, and shall not receive a double satisfaction for the same loss. Therefore where the king granted letters of reprisal on the *Spaniards* for the benefit of his subjects, in consideration of the losses they had sustained by unjust captures; Lord Chancellor *Hardwicke* held, that the insurers had a right to part of the prizes and not the owners, they having been already satisfied by the former, and that if the goods had been restored in *specie*, or compensation made for them, the insured would stand as a trustee for the insurer in proportion for what he paid. *Randal v. Cockran*, 1 *Ves.* 98.

## Of Abandonment.

1. **W**HEN the thing insured is by some of the usual perils become of so little value as to entitle the insured to call upon the underwriter to accept of what is saved and to pay the full amount of his insurance, as if a total loss had actually happened, he is then said to have a right to abandon. *Park*, 143.

2. The abandonment must be total and not partial of any particular part of the property insured. But in all cases the insured has a right to elect whether he will abandon or not. *Id.* 144. 2 *Burr.* 697. 1211.

23 G. 2.  
c. 4. s. 18.

It was also mentioned per Canc. that there was an agreement to go to trial in one of the actions, and to be bound by the event,

3. An insured ship was taken by a *Spanish* privateer, retaken by an *English* one and carried into *Boston* in *New England*, where no person appearing to give security, or to answer the moiety due for salvage, she was condemned and sold in the court of Admiralty there. The recaptors had their moiety, and the overplus money remained in the hands of the officers of the court. In an action on the policy the insured had a verdict. On a bill being filed by the insurer, praying an injunction, Lord *Hardwicke* C. refused it, saying, that the insured having offered, and being willing to relinquish his interest in the salvage, he ought to recover the whole money insured. Otherwise upon a recapture a man would be in a worse situation than if the ship were totally lost. *Pringle v. Hartley*, 3 *Atk.* 195.

and that all the circumstances of the case were known *then* to the parties.

4. Policy of insurance on a ship and on the cargo (by two distinct policies) from *Newfoundland* to *Portugal* or *Spain*, &c. The ship was to be valued at the sum subscribed. The cargo was fish and other merchandize. Part of it was thrown overboard in a storm to preserve the rest. The ship was taken by the enemy afterwards. The master, mates, and all the sailors (except an apprentice and a landman) taken out and carried to *France*; the ship remained in the hands of the enemy *eight days*, and was then retaken by a *British* privateer, and brought into *Milford Haven*; immediate notice was given by the insured to the insurers, with an offer to abandon the ship and cargo. The ship had been so far disabled by a storm, as to render her incapable of proceeding on her destined voyage without going into port to refit. The court held, that

that this was a total loss, and that the insurers had a right to abandon. *Goss v. Withers*, 2 Burr. 683.

5. Action on a policy of insurance from *Montserrat* to *London*: the question was, whether the insured should recover a total or an average loss. The facts were, that the ship was captured on her voyage by two *American* privateers, who took the captain, all the crew, and part of the cargo, which consisted of sugars, out of her. The rigging was also taken away. She was afterwards retaken and carried into *New York*, where the captain arriving to take possession of her on 23d *June*, found part of the cargo washed overboard, 57 hogheads of what remained damaged, the ship so leaky that she could not be repaired without unloading entirely. The owners had no storehouses there where the sugars could be put, nor any agent to direct the captain. No sailors could be had. The salvage amounted to the value of 40 hogheads of sugar, which he could only pay by a sale of part of the cargo. The captain did not know of the insurance. If he had repaired the ship, his expences would have exceeded the freight 100*l*. There was an embargo on all vessels at *New York* till *December*. The ship was to have arrived at *London* the preceding *July*. The captain on consulting his friends resolved to sell the ship and cargo; the latter of which was paid for, and the former left at *New York*. On his arrival in *England* he gave the plaintiff an account of what he had done, which was the first notice he received, and he immediately claimed for a total loss, and offered to abandon. Lord *Mansfield* told the jury, that if they were satisfied that the captain had done what was best for the benefit of all concerned, they must find as for a total loss, which they did; and on a motion for a new trial, the court were of the same opinion. *Milles v. Fletcher*, Dougl. 219.

6. Action on a policy of insurance on ship and goods from *Virginia* or *Maryland* to *London*. The ship having on board 192 hogheads of tobacco, was taken by a *French* privateer on 6th of *May*, while on her voyage to *London*. The privateer left only the mate and one man on board out of nine hands. She was retaken on her way to *France*, on the 23d, by an *English* man of war, and sent into *Plymouth* on 6th of *June*. The plaintiff, when he heard of this, wrote a letter to his agent in *London*, desiring him to acquaint the defendant "that he did from thence abandon to him his interest in the said ship as to the said 100*l*. by the defendant insured." The insurer refused to take to the ship, but offered to pay the salvage and all other losses that the plaintiff sustained by the capture. The ship sustained no damage by the capture, and the whole cargo was delivered to the freighters at the port of *London*, who paid the freight without prejudice. The court of K. B. were of opinion, that as the event had fixed the loss to be an average one before the action brought, before the offer to abandon, and before the plaintiff had notice of any accident, and consequently before he could make any election, he

could

Guidon,  
c. 7 l. 1.

could recover for an average loss only, and not a total one. *Hamilton v. Mendez*, 2 Burr. 1198. 1 Black. 296.

7. The right to abandon must arise upon the object of the insured being so far defeated, that it is not worth his while to pursue it: such a loss as is equally inconvenient to him as if it had been total. For instance, if the voyage be absolutely lost, or not worth pursuing; if the salvage be very high, *suppose one half*; if further expence be necessary; if the insurer will not engage at all events to bear that expence, though it should exceed the value, or fail of success. Under these and like circumstances the insured may abandon, notwithstanding there has been a recapture. *Park*, 145. 2 Burr. 1209.

8. If a ship be taken and escape immediately, which would be no hindrance at all to the voyage, or should be instantly ransomed, which would amount only to a partial loss, the insured shall not be allowed to abandon, and demand recompence for a total loss. 2 Burr. 697. *Ibid.* 1213.

9. The right to abandon must depend upon the nature of the case at the time of the action brought, or at the time of the offer to abandon, because the insurer ought never to pay less on a contract of indemnity than the value of the loss; and the insured ought never to gain more. *Hamilton v. Mendez*, 2 Burr. 1214.

10. In the *English* court of admiralty the property was not changed by capture till after sentence of condemnation. 2 Burr. 693, 694. *Ibid.* 1208, 1209.

11. By 29 G. 2. c. 34. s. 24. the *jus postliminii* on a recapture continues for ever. *Ibid.* 1209.

12. The question is immaterial between insurer and insured, and can never happen but in two cases, between the owner and a neutral vendee; or between the owner and a recaptor. *Ibid.* and 2 Burr. 693.

13. In general, though not universally, if an insured ship be taken the insured may demand as for a total loss and abandon. So he may also in case of an arrest, or an embargo by a prince not an enemy. 2 Burr. 696. *Ibid.* 1212.

14. But then he must make his election while the things insured are in jeopardy, for if it be known that they are got out of it, suffering only a partial loss before he does so, he cannot abandon.

15. Action on a policy of insurance subscribed by defendant for 100*l.* Plea of tender, and 48*l.* paid into court. The case reserved stated, that the damage sustained by the ship in the voyage insured did not exceed that sum: but that when the ship arrived at her port of delivery she was not worth repairing. The question was, whether the plaintiffs had a right to abandon. *Per cur.* They cannot. The jury have found that the damage sustained did not amount to more than 48*l. per cent.* We are precluded from saying that this is a total loss. *Cazalet & al. v. Barbe*, 1 Term Rep. 187.

16. There

16. *There is no case in which the owner can abandon, unless at some period or other of the voyage there has been a total loss.* Per Bulmer, J. *Ibid.*

17. Action on a policy of insurance on the *Prince of Wales*, in port or at sea, for 6 months, from the 18th of July. The ship was bound to *Quebec*, where she arrived, but the season being too far advanced before she was ready to return, she was removed into the basin. On 19th November she was driven from thence by a field of ice, and damaged by running on the rocks. She was found to be then bulged and much injured, but not thought irreparably so. In the progress of the repair difficulties arose from want of materials, and the captain, after consulting the agents and merchants, sold her. The court were of opinion that the loss in November should be taken as an average, not a total one. *Fur-neaux v. Bradley*, East. 20 G. 3. Park, 166.

18. Policy on ship, freight, and goods from *Tortola* to *London*, warranted to depart on or before the 1st of August. On that day the ship got under way, but not being able to get clear of the islands, they cast anchor during the night and got clear the next day, when several squalls of wind arising the ship made water so fast as to keep the crew at both pumps. On the 3d, she was obliged to return in distress to *Tortola*, and a survey being had the ship was declared unable to proceed to sea with her cargo, and that she could not be repaired in any of the *English* islands in the *West Indies*. Many of the sugars were washed out, and several of the casks broke. The ship and cargo were therefore sold at *Tortola*. The court were of opinion that this was a total loss of the ship, as she received an irreparable hurt; of the cargo, because the voyage was wholly lost; and of the freight also, because the ship could not perform the voyage. *Manning v. Newenham*, Trin. 22 G. 3. Park, 168.

19. Where the insured has an election to abandon, no right to sue as for a total loss can vest in him, until he has made that election, and he cannot elect before advice is received of the loss. *Hamilton v. Mendes*. Per Lord Mansfield. 2 Burr. 1211.

20. As soon as the insured receive accounts of such a loss as entitles them to abandon, they must in the first instance make their election whether they will abandon or not; and if they do, they must give the underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can never afterwards recover as for a total loss. *Mitchel v. Edie*, 1 Term Rep. 608.

21. But if the insured, hearing that his ship is much disabled and has put into port to repair, expresses his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the subsequent damage occasioned by that refusal, though it amount to the whole sum insured, for they have by their own act superseeded the necessity of notice. *Da Costa v. Newenham*, 2 Term Rep. 407.



## Policy of Insurance.

## Of Fraud in Policies.

1. THE ship sailed from *Jamaica* for *London* in *November*, after which an insurance was made, and the agent told the insurer that the ship sailed the latter end of *December*. *Lee* C. J. held it to be a fraud, and defendant had a verdict. *Roberts v. Fonnerneau*, at *Guildhall*, *Trin.* 1742. *Park*, 176.

2. A false assertion vitiates the contract, though the loss happen in a mode not affected by the falsity, as where the insured warranted "a neutral ship and property," they being not so in fact, and the ship was lost in a storm. The court were of opinion he could not recover. *Woolmer v. Muilman*, 3 *Burr.* 1419. 1 *Black.* 427.

3. So where a ship was warranted *Portuguese*, and condemned in *France* as not being so, the contract of insurance was held to be void. And the plaintiff having by an answer in Chancery admitted that she was condemned as not being *Portuguese*, that, together with the sentence of condemnation, in which it was said that the ship was condemned in the court of prizes, was held sufficient evidence to shew the ground on which she was condemned, without attested copies of the libel. *Fernandes v. De Costa*, *Sittings Hil.* 4 G. 3. *Park*, 177.

4. The concealment of circumstances vitiates a contract of insurance, though not done with any fraudulent intention, for the risk insured is not the same which the underwriters intended. 3 *Burr.* 1909.

5. One having heard that a ship described like his was taken, insured her without giving notice to the insurers of what he had heard. On a bill for an injunction to be relieved against the insurance as fraudulent, Lord *Macclesfield*, C. thought the concealment a fraud, and decreed the policy to be delivered up with costs, but the premium to be allowed out of them. *Da Costa v. Scandret*, 2 *P. Wms.* 170.

6. Action on a policy of insurance. It appeared that the agent for the plaintiff had on 23d *August* (two days before he effected the policy) received a letter, dated 21st *August*. "On the 12th of this month I was in company with the ship in question, at twelve at night lost sight of her at once, the captain told me he was leaky, and the next day we had a hard gale." The ship was taken on the 19th by the *Spaniards*. There was no pretence of any knowledge of the actual loss at the time of the insurance, but it was made in consequence of a letter received that day from the plaintiff abroad, dated 27th *June*. *Lee*, C. J. declared that each party ought to know all the circumstances known at the time of the contract, and the defendant had a verdict. *Seaman v. Fonnerneau*, 2 *Stra.* 1183.

7. Ship insured "at and from *Genoa* to *Dublin*, the adventure to begin from the loading to equip for this voyage." The loading  
ing

ing had been put on board at *Leghorn*, but the ship had lain in *Genoa* five months for want of a convoy. This circumstance was not communicated to the underwriter. The court held that the policy implied that *Genoa* was the loading port, which not being true, the contract was void. *Hodgson v. Richardson*, 1 *Black. Rep.* 463.

8. On the 2d *October* the ship sailed from *St. Thomas* on the coast of *Africa*, and was taken on the 6th *December*. Plaintiff received news on the 22d *February* that the ship was well and had sailed on the 22d *October*. In the instruction given to the broker for the purpose of insurance, it was said, "that the ship was on the coast on the 2d *Oct.*" but said nothing of her having sailed from *St. Thomas*; and the plaintiff in his letter to one of the brokers said, he would be glad to get 600*l.* on the ship as *she is rather long*. Lord *Mansfield* thought this a concealment of material information, and that the insurers were not liable. *Ratcliffe et al. v. Shoolbred*, *Sittings at Guildhall, Trin.* 1780. *Park*, 181.

9. So where the broker's instructions stated the ship ready to sail on the 24th of *December*, when she had sailed the 23d, Lord *Mansfield* said that this was a material concealment and misrepresentation, and the underwriter had a verdict. *Ellis v. Brutton*, *Sittings at Guildhall, Hil.* 1782.

10. The policy would be equally void against the underwriter if he concealed any thing. *Per* Lord *Mansfield*. *Carter v. Boehm*, 3 *Burr.* 1909.

11. There are many matters as to which the insured may be innocently silent.

12. He needs not mention what the underwriter knows.

13. Nor what the underwriter ought to know; and he is bound to know every cause which may occasion natural perils, as the difficulty of the voyage, the kind of season, &c. as also every cause which may occasion political perils, as the rupture of states, the operations of war, the probability of peace, &c. If he insure private ships of war by sea and on shore, from ports to ports and places to places any where, he need not be told the secret enterprises on which they are destined.

14. He need not be told what lessens the risk agreed and understood to be run by the express terms of the policy; as if he insure for three years, he needs not be told a circumstance to shew it will be over in two.

15. He need not be told the opinions of the insured on political or other appearances; for each man professes to act on his own skill and sagacity, and therefore neither needs to communicate to the other. *Per* Lord *Mansfield*. *Carter v. Boehm*, 3 *Burr.* 1910, 1911.

16. Where an insurance is entered into for the benefit of the governor of a fort, he need not disclose the condition of the place; nor his belief that from the enemy not being able to relieve their friends on the coast they might make him a visit, for it is a mere speculation of his; nor a letter he received mentioning the design

## Policy of Insurance.

they had to attack him the year before. 3 Burr. 1910, 1911. and 1 Black. 593.

17. Action on a policy of insurance. The goods were insured on board a ship from *London* to *Nantz*, with liberty to call at *Ossend*. She was cleared only for *Ossend*, but sailed directly for *Nantz*, that being the known course of the trade, to save certain duties both in *England* and *France*. *Per cur*. This is no fraud on the underwriter, and does not vacate the policy. *Planche et al. v. Fletcher, Dougl.* 238.

18. The insurance was made before the commencement of hostilities, but when every body expected a war immediately. The insured is not bound to give the underwriter notice though the ship do not sail till after the war takes place, and there being a capture the underwriter was held liable. *Ib.*

19. So where a *Portuguese* vessel was captured and condemned in *France*, on the ground of having an *English* supercargo on board. The court held that not giving notice of this was not such a fraudulent concealment of circumstances as would vitiate the policy. *Mayne v. Walter, B. R. East.* 22 G. 3. *Park*, 193.

20. A warranty or condition makes part of the written policy, and must be strictly performed, as being a part of the agreement. *Per Lord Mansfield. Pawson v. Watson, Cowp.* 788.

21. A representation is a state of the case, not a part of the policy, but collateral to it and entirely independent of it, and it is sufficient if it be substantially performed. But if it be false, it will avoid the policy. *Park*, 196. *Cowp.* 788.

22. To make written instructions binding and valid as a warranty, they must be inserted in the policy. *Ib.* 790.

23. Action on a policy of insurance. The first underwriter had the following instructions shewn to him. "Three thousand five hundred pounds upon the ship *Julius Caesar* for *Halifax*, to touch at *Plymouth*, and any port in *America*; she mounts 12 guns and 20 men. These instructions were not asked for, nor communicated to the defendant, but the ship was only represented generally to him as a ship of force. The ship was taken by a privateer, and had on board at the time six 4-pounders four 3-pounders, three 1-pounders, six half-pounders, which are called *swivels*, and 27 men and boys for her crew, but only 16 men. The witness said he considered her as of greater force than if she had 12 carriage guns and 20 men, and there were neither men nor guns on board at the time of the insurance. The court held that these instructions were merely a collateral representation, and if the parties had considered them as a warranty they would have inserted them in the policy; that it is not a fraudulent misrepresentation, but only a representation of what in the then state of the ship they thought would be the truth, and was substantially complied with, as the ship really did sail with a larger force; that consequently the policy was not void, and the insured was entitled to recover. *Pawson v. Watson, Cowp.* 785.

24. If

24. If a misrepresentation, both material and fraudulent, be made to the first underwriters, it is to be considered as a misrepresentation made to every one who signs subsequently, and infects the whole policy; for where a good man stands first the rest underwrite without asking a question. *Cowp.* 786.

25. Action on a policy of insurance on the ship *Carnatic*, "at and from *Port L'Orient* to the *Isles of France* and *Bourbon*, and to all and any ports or places where and whatsoever in the *East Indies*, *China*, *Persia*, or elsewhere beyond the *Cape of Good Hope*, from place to place and during the ship's stay and trade backwards and forwards, at all ports and places, and until her safe arrival back at her last port of discharge in *France*." But at the time this policy was subscribed there was a slip of paper wafered to it, and shewn to the underwriters, on which was written—"The ship has had a complete repair, and is now a fine and good vessel; three decks. Intends to sail in *September* or *October* next; is to go to *Madeira*, the *Isles of France*, *Pondicherry*, *China*, the *Isles of France* and *L'Orient*." The ship, instead of going from *Pondicherry* to *China*, went to *Bengal*, and touched at several places in her way thither and back, and was taken in her way home by a privateer. Lord *Manisfield* told the jury that this slip of paper was only a representation; that if they were satisfied that the real intention at the time of the representation was to go to *China*, and that it was not falsely held out with a fraudulent view, the plaintiff must have a verdict, for the insured might change his intention to go to *Bengal*, and yet be protected by the policy which admits of that voyage, and must be understood by both parties in a greater latitude than the representation, being expressed in more comprehensive terms. The plaintiff had a verdict. *Bize v. Fletcher, Dougl.* 271.

26. In getting a policy on the 30th *January* the broker represented the ship as safe in the *Delaware* on the 11th *December*. She had been lost there on the 9th *December*. This is a material misrepresentation, and makes the policy void, though it was not done fraudulently. *M'Dowall v. Frazer, Dougl.* 247. *Vid.* also *S. P. Shirley v. Wilkinson, Dougl.* 2 Edit. 293.

27. A representation that the ship is expected to sail from the coast of *Africa* on such a day, is not material so as to vitiate the policy, although it should afterwards appear that she actually sailed six months before. *Barber v. Fletcher, Dougl.* 292.

### Of prohibited Goods.

1. BY 4 and 5 *W. & M. c.* 15. *sect.* 14. Any person undertaking, by way of insurance, to deliver, or delivering in pursuance of such insurance, any prohibited goods whatsoever to be imported from parts beyond seas into this kingdom, or any foreign goods, without paying the duty, forfeits 500*l.*

## Policy of Insurance.

2. *Stat.* 15. Inflicts the like penalty upon persons agreeing to pay any sums of money for such insurance, or who shall receive or take such prohibited goods into their house, &c. or such other goods before the duties be paid, knowing thereof.

3. The 12 G. 2. c. 21. Inflicts the like penalty on persons insuring or being insured, as to the exportation of any wool, wools, &c. from *Great Britain* or *Ireland*.

4. By *stat.* 33. All policies of insurance on vessels laden with wool or woollen-yarn from *Great Britain* or *Ireland*, or any other species of wool or woollen manufacture from *Ireland*, or on the goods themselves, are made void.

5. This latter act, as far as relates to *Ireland*, was repealed by 20 G. 2. c. 6.

6. The 28 G. 3. Inflicts a penalty of 50*l.* with six months solitary imprisonment for exporting wool, &c.; and *stat.* 45. declares that persons undertaking, by way of insurance, &c. that any articles specified in the statute shall be conveyed to parts beyond the seas, or who shall deliver them in pursuance of such agreement, their aiders and abettors shall suffer the like punishment.

7. *Stat.* 46. Inflicts a like penalty upon persons paying for such insurance.

*Stat.* 48. Declares all policies on these articles, or on a ship laden with them, to be void.

8. If an insurance be made to protect smuggled goods it would be of no effect: so if made on any voyage which was contrary to the navigation act.

12 Car. 2.  
c. 10. *Vide*

also 2 W. & M. c. 9. s. 1. 7 Anne, c. 8. s. 12.

9. A person acting by the orders of the insured, and who is in anywise instrumental in procuring the insurance, is bound to disclose all he knows to the underwriter before the policy is effected; and if any material misrepresentation arises from his fraud or negligence, the policy is void, although the insured is not guilty of any improper conduct in the transaction. *Fitzberbert v. Mather*, 1 *Term Rep.* 12.

10. Where an issue was directed out of Chancery to try the validity of a policy, and the insurer had offered by his bill to pay back the premium, but had not paid it into court; the jury were of opinion against the policy, but found a verdict for the plaintiff, the insured, for the premium. The court of K. B. were of opinion, that the offer made by the complainant's bill was equivalent to the money's having been actually brought into court in the present case, and made a rule that the verdict found for the plaintiff be *vacated*, and one entered for the defendant. *Wilson v. Duckett*, 3 *Burr.* 1361.

11. Where the fraud of the insurer was very gross, Lord *Mansfield* declared that the premium should not be recovered from the underwriter. *Tyler v. Horne*, at *Guildhall*, *Hil.* 1785, *Park*, 218.

Of Sea-worthiness.

1. **B**Y an implied warranty every ship insured must be tight, staunch, and strong; but it is sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable. *Per Lord Mansfield. Eden v. Parkinson, Doug. 708.*

2. The insurers are not liable if the ship be not sea-worthy at the commencement of the voyage, although the circumstance was totally unknown to the insured. *Mills v. Roebuck, Park, 222.* Le Guidon, c. c. art. 8, 2 Mag. 90. 140. 2 Val. 81. 1 Val. 654.

3. Where the ship is not sea-worthy the policy of insurance is void, as well where the insurance is upon the goods to be conveyed in the ship, as when it is upon the ship itself. *Park, 231.*

Of illegal Voyages.

1. **A**N insurance on a voyage prohibited by statute is void.

2. Action on a policy of insurance on goods on board the *Venus*, "lost or not lost, at and from London to New York, warranted to depart with convoy from the Channel for the voyage." The ship was cleared for *Halifax and New York*; she had provisions on board which she had a licence to carry to *New York* under a proviso in the prohibitory act, 16 G. 3. But one half of the cargo, including the goods, which were the subjects of this insurance, was not licensed, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by the commander in chief to allow the entry of unlicensed goods there, but he had no authority to issue it under the act. The 1st sect. of the stat. prohibits all commerce with that province, and confiscates all ships and their cargoes which shall be found trading, or going to, or coming from trading with them. In the 2d there is a proviso for ships laden with provisions for the use of his majesty's fleets, &c.; but goods not licensed found on board such ships are declared forfeited. The ship was taken by an *American* privateer. *Per cur.*—The plaintiff's case goes on an established practice against an act of parliament. It was illegal to send these goods to *New York*, and the plaintiff can't recover on an agreement in direct contravention to the law of the land. *Johnston v. Sutton, Dougl. 241.*

3. If a ship, though neutral, be insured on a voyage prohibited by an embargo laid on in time of war, by the prince of the country, in whose ports the ship happens to be, such an insurance is void. *Deimada v. Motteux, B. R. Mich. 25 G. 3. Park, 234.*

4. But *Qu.* If the embargo had been laid on in time of peace for the power of the king of *Great Britain* to lay on such restraints then seems doubtful. *Ib.*

## Policy of Insurance:

5. If a person, with full knowledge that the ship has traded, or intends to trade contrary to the revenue laws of another country makes an insurance, it is a fair contract and valid; for no country pays attention to the revenue laws of another. *Planche v. Fletcher, Dougl. 238. Lever v. Fletcher, Park, 237.*

6. *Quare*, How far trading with an enemy in time of actual war is legal? *Vide Park, 237.* and authorities there cited.

7. But insurances upon ships or goods of an enemy or subject on a voyage to a besieged place, with a view of carrying them assistance, or upon ammunition, provision, or warlike stores, are void; the carriage of such commodities being prohibited by the law of nations. *Park, 243.*

## Of Wager Policies.

1. **I**N policies upon interest you recover upon the loss actually sustained, whether it be total or partial; but on a wager policy you can never recover but for a total loss.

2. An act passed 19 G. 2. c. 37. regulating insurances on ships belonging to the subjects of *Great Britain*, and on merchandizes and effects laden thereon.

3. It states the causes which gave rise to it in the preamble:  
 “Whereas it hath been found by experience that the making of  
 “insurances, interest or no interest, or without further proof of  
 “interest than the policy, hath been productive of many pernicious  
 “practices, whereby great numbers of ships, with their  
 “cargoes, have either been fraudulently lost and destroyed or  
 “taken by the enemy in time of war, and such assurances have  
 “encouraged the exportation of wool, and the carrying on many  
 “other prohibited and clandestine trades, which by means of  
 “such assurances have been concealed, and the parties concerned  
 “secured from loss, as well as to the diminution of the public  
 “revenue as to the great detriment of fair traders, and by introducing  
 “a mischievous kind of gaming or wagering under the  
 “pretence of assuring the risk on shipping, and fair trade, the institution  
 “and laudable design of making assurances, hath been perverted,  
 “and that which was intended for the encouragement of trade  
 “and navigation has in many instances become hurtful  
 “of and destructive to the same,”

4. *Seet. 1.* “For remedy whereof be it enacted, that no assurance  
 “or assurances shall be made by any person or persons, bodies corporate  
 “or politic, on any ship or ships belonging to his majesty or any of his  
 “subjects, or on any goods, merchandizes, or effects, laden or to be  
 “laden on board of any such ship or ships, interest or no interest,  
 “or without further proof of interest than the policy, or by way of  
 “gaming or wagering, or without benefit of salvage to the assurer,  
 “and that every such assurance shall be null and void to all intents and purposes.”

5. *Seet.*

5. *Señ. 2.* " Provided always, that assurances on private ships of war, fitted out by any of his majesty's subjects solely to cruize against his majesty's enemies may be made by or for the owner thereof, interest or no interest, free of average, and without benefit of salvage to the assurer, any thing herein contained to the contrary thereof in anywise notwithstanding."

6. *Señ. 3.* " Provided also, that any merchandizes or effects from any ports or places in *Europe* or *America* in the possession of the crowns of *Spain* or *Portugal*, may be assured in such way and manner as if this act had not been made."

7. *Señ. 5.* " And be it enacted, that all and every sum and sums of money to be lent on bottomry, or at *respondentia* upon any ship or ships belonging to any of his majesty's subjects, bound to or from the *East Indies*, shall be lent only on the ship, or on the merchandize or effects laden or to be laden on board of such ship, and shall be so expressed in the condition of the said bond, and benefit of salvage shall be allowed to the lender, his agents or assigns, who alone shall have a right to make assurance on the money so lent: and no borrower of money on bottomry, or *respondentia*, as aforesaid, shall recover more on any assurance than the value of his interest in the ship, or in the merchandizes or effects laden on board of such ship, exclusive of the money so borrowed; and in case it shall appear that the value of his share in the ship, or in the merchandizes or effects laden on board, doth not amount to the full sum or sums he hath borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed as he hath not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, together with the assurance, and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandize be totally lost."

8. This regulation of insurance on bottomry or *respondentia* interest extends only to *East-India* ships: and therefore an insurance of a *respondentia* interest upon any other ships may be made in the same manner as they used to be before this act. *Park*, 264.

9. It has also been decided upon this clause of the act, that it never meant to make any alteration in the manner of insurances, and it was declared by the whole court in *Glover v. Black* to be the established law and usage of merchants that *respondentia* and bottomry must be specified in the policy of insurance. *Park*, 264. 3 Burr. 1394.

10. Action on a policy on goods on board three *French* vessels, all or any of them, from *St. Domingo* to *Bourdeaux*; the policy to be deemed sufficient proof of interest in case of loss. The court were of opinion that the plaintiff was entitled to recover the sum insured by the defendant, even if it could be proved that he had no property on board, as it was not a policy within this statute; foreign ships not having been included on account of the difficulty of bringing witnesses from abroad to prove the interest. *Thebussan v. Fletcher*, *Dougl.* 301.



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11. A valued policy is not to be considered as a wager policy; the only effect of the valuation is fixing the amount of the prime cost; but for every other purpose it must be taken that the value was fixed in such a manner, as the insured meant only to have an indemnity. *Per Lord Mansfield, Lewis v. Rucker, 2 Burr. 1167.*

12. But where they are used merely as cover to a wager, as if a man insured 2000*l.* and had interest on board to the value of a cable only, they would be considered as an evasion of 19 G. 2. *Id. ib.*

13. Policy of insurance on the profits expected to arise on a cargo of melasses belonging to the plaintiff, who had a contract to supply the army with spruce beer. It contained a clause, declaring, "that in case of loss, it was agreed that the profits should be valued at 1000*l.*, without any other voucher than the policy." Lord Mansfield thought this an insurable interest, and the court of B. R. were of opinion that this policy could not be distinguished from a valued one, and therefore was not within the act: for the meaning of the policy was merely to avoid the difficulty of going into an exact account of the quantum of the profits. *Grant v. Parkinson, Mich. 22 G. 3. Park, 267.*

14. Insurance upon any of the packet-boats that should sail from *Lisbon* to *Falmouth*, or such other port in *England* as his majesty should direct, for one year, upon any kind of goods and merchandizes whatsoever; and it was agreed that the goods should be valued at the sum insured on such packet-boat without further proof of interest than the policy; and to make no return of premium for want of interest being on bullion or goods. The court held this policy to be an exception out of the 19 Geo. 2. c. 37. It is a mixed policy; partly a wager policy, partly an open one: and it is a valued policy and fairly, without fraud or misrepresentation.

15. The officers and crews of ships who take a prize in conjunction with his majesty's land forces have an insurable interest therein, by virtue of the prize-act which usually passes at the commencement of the war. 2dly, Possession would entitle them to insure, upon the bare contingency of a future grant from the crown, it having constantly given a grant of it after condemnation since the time of Queen Anne. *Le Gras v. Hughes, B. R. East. 22 G. 3. Park, 269.*

16. Action on a special agreement, whereby the plaintiff promised to pay 20*l.* to the defendant at the next port a ship should reach, provided that if she did not save her passage to *China* the defendant would pay to the plaintiff 1000*l.* at the end of one month after she arrived in the river *Thames*. It was made without reference to any property. But the plaintiff had some goods on board liable to suffer by the loss of the season. The court held this to be within 19 G. 2. c. 37., and that if it was not, that act would be entirely defeated. *Kent v. Bird, Cowp. 583.*

17. The plaintiffs had lent *Lawson*, captain of an *East-Indiaman*, 26,000*l.*, for which he had given them a common bond in the  
penal

penal sum of 52,000*l.* While he was with his ship at *China*, the plaintiffs got a policy of insurance underwritten by the defendant and others in the following terms: "At and from *China* to *London*, beginning the adventure upon the goods from the loading thereof on board the said ship at *Canton* in *China*, &c. and upon the said ship from and immediately following her arrival at *Canton* in *China*, valued at 26,000*l.*, being the amount of Captain *P. Lawson's* common bond, payable to the parties, as shall be described at the back of this policy; and it bears date, &c.: and in case of loss, no other proof of interest to be required than the exhibition of the said bond: warranted free from average, and without benefit of salvage to the insurer." On the head of the subscription was written, "on a bond as above expressed." The court held this to be a wagering policy, the plaintiffs having no interest, for if the ship had been lost and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from *Lawson*. *Lowry v. Bourdieu*, Dougl. 451.

18. The reason of the exception in the 3d section of insurances upon any merchandizes, &c. from any ports or places in *Europe* or *America* in the possession of the crowns of *Spain* or *Portugal* is, that the trade from these countries to their colonies, and the returns thereof, can only be carried on by their own subjects; therefore all the goods exported from *Spain* and *Portugal* by the subjects of this country must be in the names of *Spanish* subjects. So that no other proof but the policy can be brought. *Park*, 274.

### Of Re-assurance, and double Insurance.

1. **RE-ASSURANCE** is a contract which the first insurer enters into in order to relieve himself from those risks which he has incautiously undertaken, by throwing them upon other underwriters who are called re-assurers. *Park*, 276.

2. By 19 G. 2. c. 37. s. 4. it is enacted, "That it should not be lawful to make re-assurance, unless the assurer should be insolvent, become a bankrupt, or die; in either of which cases such assurer, his executors, administrators, or assigns might make re-assurance, to the amount before by him assured, provided it should be expressed in the policy to be a re-assurance."

3: This clause extends to re-assurance on foreign ships. The point came on in the form of a special case, stating that a re-assurance was made by the defendant on a *French* vessel first insured by a *French* underwriter at *Marseilles*, who was living and solvent at the time of subscribing the second policy. The court of K. B. held the policy to be void by this section. *Andree v. Fletcher*, 2 Term Rep. 161.

4. An insurance on the solvency of an underwriter would be considered as a gaming policy under 19 G. 2. c. 37. *Park*, 280.

5. A double assurance is when the same man is to receive two sums

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furns instead of one for the same loss, by reason of his having made two insurances upon the same goods or ship. *Park*, 280. cites 1 *Burr.* 496.

6. A double insurance is not void, and though the insured is not entitled to two satisfactions, yet upon the first action he may recover the whole sum insured, and may leave the defendant therein to recover a rateable satisfaction from the other insurers. *Newby v. Read*, Sittings at *Guildhall, East.* 1763. 1 *Black.* 416. *Rogers v. Davis*, Sittings first P. *Mich.* 17 G. 3. *Davis v. Gildart*, second P. Sittings at *Guildhall, East.* 17 G. 3. *Coram Lord Mansfield.*

7. Various persons may insure various interests on the same thing, and each to the whole value, (as the master for wages, the owner for freight, one person for goods, another for bottomry.) The person to whom the cargo is assigned by the indorsement of the bills of lading may insure it, as may the factor to whom the goods are consigned, if he has a balance due to him by the consignee. *Godin & al. v. The London Assurance Company*, 1 *Burr.* 489. 1 *Black. Rep.* 183. *Qu. vide.*

## Of changing the Ship.

1. **W**HERE an insurance is made on a specific ship, and the insured, not being impelled by any necessity, without the consent of the underwriter, changes the ship in the course of the voyage, he has not kept his part of the contract, and cannot recover against the underwriter. *Park*, 293. *Per Lord Mansfield.* *Pelly v. The Royal Exchange Assurance Company*, 1 *Burr.* 351.

2. The plaintiff had insured interest or no interest on any ship he should come in from *Virginia* to *London*, beginning his adventure on his embarking on board such ship; the money to be paid, though his person should escape, or the ship be retaken. He embarked on the *Speedwell*, but she springing a leak at sea, he went on board the *Friendship* and arrived safe at *London*, but the *Speedwell* was taken after he left her. *Lee, C. J.* held the underwriter liable, for the insurance is on the ship the plaintiff set out in, and had that got safe home, and the other been lost, the plaintiff could not have recovered on the ground of having removed his person into the ship in the middle of the voyage. *Dick v. Barrell*, 2 *Stra.* 1248.

## Of Deviation.

1. **D**EVIAION is a voluntary departure without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever a deviation of this kind takes place, the voyage is determined, and the underwriters are discharged from any responsibility. *Park*, 294.

2. Where

2. Where a ship, bound from *Dartmouth* to *Liverpool*, put into *Lee*, a place she must of necessity pass by in the course of her insured voyage; although no accident befel her there, but she was lost after she got out to sea again, yet, as she had no liberty given her by the policy to go in there, *Yates J.* held it to be a deviation. *Fox v. Black, Exeter Assizes 1767. Park, 295.*

3. So where a ship put into a port in her way to procure a *Mediterranean* pass, and was afterwards lost, it was held a deviation. *Townson v. Guyon, cor. Lord Mansfield. Park, 295.*

4. A ship, insured from *Cork* to *Jamaica* with a convoy, cruized during the night, and thereby deviated out of the direct course of the voyage. This is a deviation, *Cock v. Townsend, C. B. cor. Lord Camden C. J. Park, 298.*

5. But a ship, having letters of marque, may, from the usage, chase an enemy, although she cannot cruize; and even if she lose sight of the enemy for some hours, it will be no deviation. *Jolly v. Walker, cor. Lord Mansfield, East. 1781, at Guildhall. Park, 299.*

6. The ship *Eyles* being at *Bengal* in 1732, the owner insured her for 500*l.* the adventure thereon to commence from her arrival at *Fort St. George*, and thence to continue till the ship should arrive at *London*. The *Eyles* came to *Fort St. George, February 1733*, in her way to *England*, but being leaky and in a very bad condition, on the unanimous advice of the governor, council, commanders of ships, &c. she sailed to *Bengal* to be refitted; and being sheathed, in her return upon her homeward bound voyage, she struck upon the *Engilee* sands and was lost. When this cause came on before Lord Chancellor *Hardwicke* he refused to decide it; but he observed that if the ship was in a decayed condition, and went to the nearest place to be refitted, he should consider it equally the same as if she had been repaired at the very place from whence the voyage was to commence according to the terms of the policy, and no deviation. His lordship directed an issue to try whether the loss was a loss during the voyage, and according to the adventure which was agreed upon and intended to be insured; and on the trial at *Guildhall* in *C. B.* there was a verdict for the plaintiff. *Motteux et al. v. The London Assurance Company, 1 Atk. 345. Guibert v. Readshaw, Sittings in London, Hil. 1781. cor. Lord Mansfield, S. P. Park, 301.*

7. If the ship be driven out of her direct course by stress of weather, it is no deviation. *Harrington v. Halkeld, cor. Lord Mansfield, 1778. Park, 302.*

8. When a ship was driven by storm from *St. Kitt's* (being her port of loading) into *St. Eustatius*, which was in her road to *London*, to which place she was insured, and after having done all she could to get up from thence to *St. Kitt's* she was sold to a person there, when, not having finished her loading at *St. Kitt's*, she took in the rest of her cargo there, and was afterwards lost in her voyage to *London*: this was held to be no deviation, and the insurer liable. *Delaney v. Stoddart, 1 Term Rep. 22.*

9. On

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9. On an insurance from *London to Gibraltar*, warranted to depart with convoy. It appeared that there was a convoy appointed for that trade at *Spithead*, and the ship, having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her way thither. *Lee C. J.* held the ship to be under the defendant's insurance to a place of general rendezvous. *Gordon v. Morley; Campbell v. Bourdieu*, 2 *Stra.* 1265. *Bond v. Nutt.* Per Lord *Mansfield*.—Although the usual place of rendezvous be out of the direct course of the voyage. *Cowp.* 601. *Enderby et al. v. Elletcher, Sittings in London, cor. Lord Mansfield.* *Trin.* 1780: *Park*, 309.

10. If it be customary for ships to stop at certain places lying out of the direct course of the voyage, it is no deviation; but it must be the settled and direct usage of the voyage and trade. *Salisbury v. Townson, Park*, 309.

11. Where there is a deviation through necessity, it is incumbent on the insured to pursue that voyage of necessity directly in the shortest and most expeditious manner, and if the ship in her way stops at different places and trades there, these are deviations, and not within the protection which the supposed necessity affords to the direct voyage. *Lavabre v. Walter, Dougl.* 271.

12. Insurance from *Carolina to Lisbon*, and from thence to *Bristol*. It appeared that the captain had taken in salt, which he was to deliver at *Falmouth* before he went to *Bristol*; but the ship was taken in the direct road to both, before she came to the dividing point where she would have turned off to *Falmouth*. *Lee C. J.* held the insurer liable, for it is but an intention to deviate. *Foster v. Wilmer*, 2 *Stra.* 1249. *Carter v. Royal Exchange Assurance Company.* *S. P. Ibid. S. P.* Per Lord *Mansfield* in *Theluffon v. Ferguson, Dougl.* 346.

13. The ship *Molly* being insured "at and from *Maryland to Cadiz*," was taken in *Chesapeake Bay*, in the way to *Europe*. In an action on the policy against the underwriters, it appeared that the ship was cleared from *Maryland* to *Falmouth*, and a bond given, that all the enumerated goods should be landed in *Britain*, and all the rest in the *British* dominions. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were "to *Falmouth* and a market," and there was no direct evidence whatever that she was destined for *Cadiz*. The place where she was taken was in the course both to *Cadiz* and *Falmouth*. Lord *Mansfield* told the jury, that if they thought the voyage intended was to *Cadiz* they must find for the plaintiff; but if they should think there was no design of going to *Cadiz*, they should find for the defendant. And on a motion for a new trial, the court were of opinion on the evidence that the voyage never was designed for *Cadiz*, and discharged the rule. *Woolbridge v. Boydell, Dougl.* 16.

14. If a ship be insured from a day certain, from *A.* to *B.*, and before the day sail on a different voyage from that insured, the assured cannot recover, though the ship afterwards fall into the

the course of the voyage insured, and be lost after the day on which the policy was to have attached. *Way v. Modigliani*, 2 Term Rep. 30. See Kewley v. Ryan, 2 H Black. 353.

15. Deviation or not is a question of fact, to be decided according to the circumstances of the case. *Dougl.* 758.

### Of Non-compliance with Warranties.

1. A Warranty on a policy of insurance is a condition or contingency, that a certain thing shall be done or happen; and unless that is strictly performed, whether it be material or otherwise, there is no valid contract. *Park*, 318.

2. Action on a policy of insurance on goods, dated 9th Dec. 1784, *lost or not lost*, warranted well this 9th day of Dec. 1784. The policy was underwritten between the hours of one and three in the afternoon of the 9th of Dec. It appeared that the ship was well at six o'clock in the morning, but was lost at eight o'clock the same morning. Upon motion to set aside a nonsuit the court of K. B. were of opinion that the warranty was sufficiently complied with, if the ship were well at any time of the day. For though the thing warranted must be literally complied with, yet if it be so, that is enough; that there was good reason for inserting these words, because they protected the underwriter from losses before that day to which he would otherwise have been liable, as the policy was on the goods from the lading: and thus too the words "*lost or not lost*" have also their operation. *Blackburnst v. Cockell*, 3 Term Rep. 360.

3. Though a written paper be wrapped up in the policy when it is brought to the underwriters to subscribe, and shewn to them at the time; or even though it be wafered to the policy at the time of subscribing, it is not a warranty, but only a representation. *Per Lord Mansfield. Pawson v. Watson*, Cowp. 798. *Pawson v. Barnevelt*, Dougl. 12. n. *Bize v. Fletcher*, Ib.

4. Plaintiff insured the ship *Martha*, at and from London to New York, the voyage to commence from a day specified, and in the margin of the policy was written these words "eight nine-pounders with close quarters; six six-pounders on her upper decks; thirty seamen besides passengers." *Per Lord Mansfield*—There is no doubt but this is a warranty. Its being written on the margin makes no difference. *Bean v. Stupart*, Dougl. 10. *Kenyon v. Berthon*, S. P. Dougl. p. 12. n. 4. *De Hahn v. Hartley*, S. P. Resolved 1 Term Rep. 343.

5. In an action on a policy, the declaration stated that a policy was made on the ship *New Westmorland*, at and from Jamaica to London, warranted to sail on or before the 26th of July 1776, free from capture, and free from all restraints and detentions of kings, princes, and people, of what nation, condition, or quality soever. That the ship was preparing and ready to set sail, and would have sailed on the 25th of July on her intended voyage, if  
she

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*she had not been detained by Sir B. K. the then governor of Jamaica, and detained beyond the day; that she then sailed and was captured. On motion to set aside a verdict for the plaintiff, the court were of opinion that the warranty was positive and express that the ship should depart on or before the day appointed, and therefore must be complied with, and made the rule to set aside the verdict and enter a nonsuit absolute. Hore v. Whitmore, Cowp. 784.*

6. On the 8th of December 1777, a policy was underwritten by the defendant on goods in a French ship "at and from Martinico to Havre de Grace, with liberty to touch at Guadaloupe; warranted to sail after the 12th of January, and on or before the 1st of August 1778." At the time of the insurance it was not known whether the ship would load at Martinico or Guadaloupe, the insurers having goods to come from both places, the policy was therefore intended to cover the risk from both or either of them. The ship having finished her outward-bound voyage at Martinico, sailed from thence on the 6th of November 1777, for Guadaloupe, where she took in her whole lading without returning to Martinico, which the captain intended to do, had he not got a complete cargo at Guadaloupe, from whence the ship sailed on 26th of June 1778, and was taken on the 3d of September. On an action against the underwriters it was objected for the defendants, that by the words of the policy the voyage was to commence at Martinico, and not from Guadaloupe, and that the warranty of the time of sailing was not complied with; the ship having sailed from Martinico before the 12th of January 1778, viz. 6th November 1777, and the jury, under the direction of Buller J. found for the defendants. *Vezian v. Grant, Park, 326.*

7. Action on a policy on the ship *Capel*, lost or not lost, at and from Jamaica to London; warranted to have sailed on or before the 1st of August 1776. The policy was effected on the 20th of August. The ship was completely laden for her voyage to England at St. Anne's in Jamaica; and sailed from St. Anne's bay on the 26th of July for Bluefields, in order to join convoy there, that being the general rendezvous for convoy on the Jamaica station, and where a convoy then lay, which was expected to sail for England every day; but the greater part of the way from St. Anne's to Bluefields is out of the direct course of the voyage from St. Anne's to England. She arrived off Bluefields on the 28th or 29th of July, where she was immediately stopped by an embargo laid on all vessels being in any port of Jamaica, and was detained there 'till the 6th of August, when she sailed with the convoy for England, but afterwards, being separated in the passage, was taken by an American privateer. A verdict being found for defendant, the court of B. R., after two arguments, were of opinion that the voyage from Jamaica to England, began from St. Anne's; the ship having sailed with no other object or view but to make the best of her way to England by the safest course, and granted a new trial. *Bond v. Nutt, Cowp. 601. Theluffson v. Ferguson, S.P. Dougl. 346. Theluffson v. Staples, Park; 336.*

8. An embargo was actually published before the ship sailed, and the captain immediately after crossing the bar, returned to make a protest, and sent his ship knowingly into the embargo; but he swore that he expected the embargo was to be taken off, and that he should proceed immediately upon his voyage, and the jury believing him, the insurer had a verdict. *Earle v. Harris*, cited by Lord Mansfield in *Thebasson v. Staples*, 1b.

9. Rule to shew cause why a verdict obtained by the defendant should not be set aside and a new trial had. It was an action on a policy on the ship *Arundel*, Captain *Mann*, at and from *Jamaica* to *London*, warranted to depart with convoy. On 25th July the *Arundel* sailed from *Morant* harbour to *Kingston*, where she met the *Glorieux* man of war, Captain *C.* who was likewise on his way to join Admiral *Graves* at *Bluefields*, where the commander in chief had appointed him to rendezvous in order to take the fleet of merchant ships, which were to sail from thence upon the 1st of *August*, under his command, and to convoy them to *Great Britain*. On their meeting in *Kingston* harbour Captain *Mann* applied to Captain *C.* for sailing orders, who said he had none, not having himself at that time joined the admiral. They proceeded together to *Bluefields*; but the admiral had sailed two days before. The *Glorieux* and *Arundel* then sailed from *Bluefields*, the former firing guns, giving signals, and behaving in every respect like a convoy, as the captain had promised to do before they sailed. They afterwards joined the fleet on the 7th *August*, and the *Arundel* was afterwards lost in a storm. The court, *Willes J.* dissentiente, were of opinion that the warranty in the policy was not complied with, and discharged the rule. For ships must sail under the convoy appointed by the government of the country, who proportion the strength of it to the necessity of the times. That it was a question of fact, whether the *Glorieux* was a part of the convoy or not, and it appeared from the evidence that she was not, for to make her so it must appear that she was under the orders of the admiral. *Hibbert v. Pigou*, *East*. 23 G. 3. *Park*, 339.

10. The warranty "to depart with convoy," or "to sail with convoy," means to depart with a convoy intended for the whole voyage. But when a convoy for the whole voyage is clearly intended, an unforeseen separation is an accident to which the underwriter is liable. *Lilly v. Ewer*, *Dougl.* 72.

*Vid Jeffries v. Legendre*, 16 Vin. 407.

*Carth.* 216. 4 *Mod.* 58. *S. P.*

10. A ship warranted to depart with convoy waited for it two months, and then sailed out of the harbour to join it, pursuant to a signal made by the admiral of the convoy as he passed the harbour, a yawl being also sent in to order the ships which were there out. She joined the fleet, but could not get to a man-of-war for sailing orders, owing to tempestuous weather, and was afterwards captured. *Lee C. J.* held, that as the captain had done every thing in his power to receive sailing orders, it was a departing with convoy. *Victoria v. Cleave*, 2 *Str.* 1250.



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12. Action on a policy, there being a warranty to depart with convoy. It appeared in evidence that the commodore of the convoy had made signals for sailing the night before, and made repeated ones the next morning from 7 till 12, notwithstanding which the ship insured did not sail till two hours after him, in consequence of which she was taken by a privateer. The plaintiff was nonsuited. *Taylor v. Woodnesf, cor. Lord Mansfield, at Guildhall, Hil. 4 G. 3. Park, 349.*

13. Plaintiffs insured the *Tonge Herman Hiddinga*, and her cargo, at and from *L'Orient* to *Rotterdam*, "warranted a neutral ship and neutral property." The ship being captured during her voyage by some *English* men of war, in an action against the underwriters on the policy, the declaration stated, that the defendants subscribed the policy on 28th *November* 1780, and that the ship and cargo were at that time neutral property. It appeared in evidence, that the ship and cargo were neutral property at the time of the ship's departure from *L'Orient*, and so continued until the 20th of *December* 1780, when hostilities commencing between the *English* and *Dutch*, the ship and cargo ceased to be neutral property, and were taken on the 25th of *December* 1780. The court of *B. R.* were of opinion, that the insured only warranted the property neutral at the time of her departure, and not that they were to continue so during the whole voyage, and the *possea* was delivered to the plaintiffs. *Eden & al. v. Parkinson, Dougl. 705.*

*Saloucci v. Johnson,*  
Per Buller J.

*S. P. Park, 364. Tyson et al. v. Gurney, B. R. 30 G. 3. 1b. 353. S. P. Adm.*

14. In an action on a policy of insurance upon the *Joanna*, "warranted neutral ship and neutral property." A condemnation of a foreign court of admiralty is not conclusive evidence that the ship was not neutral, unless it appear that the condemnation went upon that ground. *Bernardi v. Motteux, Dougl. 554.*

15. But if it appear evident without any ambiguity, that the sentence of a foreign court of admiralty proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured that he has not complied with the warranty, and the underwriter is no longer responsible. *Barzillay v. Lewis, B. R. Trin. 22 G. 3. Park, 359. De Souza v. Ewer, Guildhall, Hil. 1782. cor. Lord Kenyon, S. P.*

16. Action against the underwriters on a policy of insurance on goods warranted neutral. The sentence of the *Spanish* court of admiralty, condemning the ship and cargo as good and lawful prize, and not stating the special ground of the sentence, was held to be conclusive evidence of the falsehood of the plaintiff's warranty. *Saloucci v. Woodmasts, B. R. Hil. 24 G. 3. Park, 362.*

17. If the ground of the decision appear to be not on want of neutrality, but upon a foreign ordinance manifestly unjust and contrary to the law of nations, and the insured has only infringed such law; as the condemnation did not proceed on the point of neutrality,

neutrality, it cannot apply to the warranty so as to discharge the insurer. *Mayne v. Walter, B. R. East. 22 G. 3. Park, 363.*

18. Action upon a policy upon a *Tuscan* ship, warranted neutral. Upon a case stated for the opinion of the court of *B. R.* it appeared that the plaintiffs were *Tuscan* subjects resident at *Leghorn*; that the ship, having neutral goods on board consigned to *London*, was captured by a *Spanish* vessel, carried into *Spain*, and there condemned as prize; that the grounds of the condemnation were— 1st, That the ship refused to be searched, and resisted with force, having fired at the *Spaniard*. 2d. That she had no charter-party on board. The captain answers them thus. 1st. That he resisted and fired, the *Spaniard* having hailed him under false colours. 2d. That he had taken the goods on board by the piece, in which case a manifesto without a charter-party is sufficient. The sentence admits the ship to be neutral, for it states it to be “the ship *Thetis*, a *Tuscan* ship.” The second ground was given up as not being a cause of seizure, and the court were of opinion that a neutral ship need not stop to be searched, but the stoppage is at the peril of the party, and a refusal is no breach of neutrality to affect the owners. *Saloucci v. Johnson, Hil. 25 G. 3. Park, 364.*

## Of Return of Premium.

1. **I**N all countries in which insurances have been known, it has been a custom, coeval with the contract itself, that where property has been insured to a larger amount than the real value, the insurer shall return the overplus *premium*: or if it happen that goods are insured to come in a certain ship from abroad, but are not in fact shipped, the premium shall be returned. If the ship be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the insured is not, it should seem the latter will be entitled to have his premium restored on the ground of fraud. *Park, 367.*

2. But if both parties be ignorant of the arrival, and the policy be (as it usually is) *lost or not lost*, I think in that case the underwriter should retain; because under such a policy, if the ship had been lost at the time of subscribing, he would have been liable to pay the amount of his subscription. *Ib.*

3. Action against an underwriter for a return of *premium*. The material part of the policy was “At and from any port or ports in *Grenada* to *London*, or any ship or ships that shall sail on or between the 1st of *May* and the 1st of *August* 1778, at 18 guineas *per cent.*, to return 8*l.* *per cent.* if she sails from any of the *West India* islands with convoy for the voyage and arrives.” At the bottom was a written declaration, that the policy was on sugars (the *Muscovado*, valued at 2*ol.* *per* hoghead), for the account of *L. Q.*, being the first sugars which shall be shipped for that account. The ship sailed with convoy within the time limited, having on board 51 hogheads of sugar belonging to *L. Q.*, and arrived safe in the

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*Downs*, where convoy left her, they never coming further. Afterwards she struck on the *Pan-sand* at *Margate*, 11 of the 51 casks of sugar were washed overboard and the rest damaged. She was afterwards got off and arrived safe in *London*. The sugars saved were taken out at *Margate*, and when sold produced but 341*l.* instead of 800*l.*, at which they were valued. The defendant had paid into court the value of the sugars lost, and a return of 8*l. per cent.* on 341*l.* The plaintiffs insisted that they were entitled to have 8*l. per cent.* also returned on the valued price of the 11 hog-sheads of sugar which were lost, and on the difference between what the remaining 40 hog-sheads produced and their valued price. A verdict being found for the plaintiff, on a motion for a new trial, the court were of opinion that the words "*and arrives*" did not mean that the ship should arrive in the company of convoy, but only that she herself shall arrive; and as to the return of the additional premium, whether the goods arrive safe or not, makes no part of that question. That which gave rise to an increase of premium was the danger of capture, and when that is diminished there should be a proportional return of premium; and the rule was discharged. *Simonet et al. v. Boydell, Dougl. 255.*

4. In *England* it has always been the custom, when the policy is cancelled, to return the premium, deducting one half *per cent.* *Molloy, lib. 2. c. 7. s. 12. Park, 372.*

Per Buller J.  
It makes no  
difference  
whether the  
premium  
was paid be-  
fore the voy-  
age or after  
it. *Ib.*

As to the difference where the relief is applied for when the contract is *executory* and when it is *executed*, *vid. Wharton v. De-La-Rive, Park, 376.*

5. An insurance being made without interest, and the premium paid, the insured shall not recover back the premium after the ship has arrived safe. The court seemed in this case to go on the ground of the contract being *executed*, the risk being over. But they seemed to think that if the action had been brought while the contract was *executory* it would have been otherwise. *Lowry v. Bourdieu, Dougl. 451. Andree v. Fletcher, 3 Term Rep. 266.*

6. Insurance on a ship at five guineas *per cent.*, lost or not lost, *at and from London to Halifax in Nova Scotia*, warranted to *depart with convoy from Portsmouth*, for the voyage, that is to say the *Halifax* or *Louisbourg* convoy. Before the ship arrived at *Portsmouth* the convoy was gone. Notice of this was immediately given to the underwriter, and he was desired either to make the long insurance or to return part of the premium. In an action for the amount of it, as money had and received to plaintiff's use, the jury find that the usual settled premium from *London to Portsmouth* is one and an half *per cent.*, and that it is usual for the underwriter in like cases to return part of the premium; but the *quantum* is uncertain as it depends upon uncertain circumstances. The court of *B. R.* were of opinion that upon the policy there were two distinct points of time, in effect two voyages, one from *London to Portsmouth*, and the other from thence to *Halifax*, which were clearly in the contemplation of the parties, and only one of them

them made. It was a conditional contract, and the second voyage was not begun, therefore the premium for it must be returned, for the risk never took place at all upon it. *Stevenson v. Snow*, 3 Burr. 1237. 1 Black. Rep. 318. S. C.

7. But where the policy was, "at and from London to any other port or place whatsoever for 12 months, at 9l. per cent., warranted free from capture by the Americans;" and the ship was taken in two months by an American privateer: The court thought the risk entire, and being once begun, that there should be no return of premium. *Tyrie v. Fletcher*, Cowp. 666.

8. So where the insurance was "for 12 months, at and after the rate of 15s. per month," it was held that there should be no apportionment, nor return of premium. *Loraine v. Tomlinson*, Dougl. 564.

9. Insurance on a ship and goods "At and from Honfleur, to the coast of Angola, during her stay and trade there. At and from thence to her port or ports of discharge in St. Domingo back to Honfleur." On the voyage from Angola to St. Domingo there was a wilful deviation. The court of King's Bench held this contract to be entire, and the risk having been commenced, that the insured was not entitled to a return of premium for the voyage from St. Domingo back to Honfleur. *Bermou v. Woodbridge*, Dougl. 751. *Meyer v. Gregson*, B. R. East. 24 G. 3. S. P. Park, 389.

10. Action for the return of premium. The policy was "at and from Jamaica to London, warranted to depart with convoy for the voyage, and to sail on or before the 1st of August." The ship sailed on the 31st of July, but without convoy. The jury found in addition "that the constant usage in an insurance at and from Jamaica to London, warranted to depart with convoy, or to sail on or before the 1st of August, when the ship does not depart with convoy, or sails after the 1st of August, is to return the premium, deducting one half per cent." On a case reserved, the court of B. R. were of opinion, that an express usage being found, it cured the difficulty arising from an apportionment, and the *posse* was delivered to the plaintiff. *Long v. Allen*, B. R. East. 25 G. 3. Park, 390.

## Of Insurances upon Lives.

1. BY 14 G. 3. c. 48. s. 1. it was enacted, "That no insurance should be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or any other event or events whatsoever, wherein the person or persons, for whose use, benefit, or on whose account such policies should be made, should have no interest, or by way of gaming or wagering: and every insurance made contrary to the true intent and meaning thereof, should be null and void to all intents and purposes."

2. By sect. 2. It was further enacted, "That it should not be lawful to make any policy or policies on the life or lives of any person

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person or persons, or other event or events, without inserting in such policy or policies the person's name interested therein, and for whose use, benefit, or on whose account such policy was so made and underwrote."

3. By *sett.* 3. "That, in all cases where the insured had an interest in such life or lives, event or events, no greater sum should be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events."

4. Action on a policy of insurance on the life of *James Ruffel*, from the 1st of *June* 1784 to the 1st of *June* 1785. By a memorandum at the foot of the policy, it was declared that it was intended to cover the sum of 5000*l.* due from *Ruffel* to the plaintiff, for which he had given his note. Two objections were made for the defendant. 1st. That part of the consideration for the note was money won at play. 2d. That *Ruffel*, at the time he gave the note, was an infant. Mr. Justice *Buller* nonsuited the plaintiff on the 1st ground, for as part of the consideration of the note was for a gaming transaction, there was a want of interest in the plaintiff. On the 2d, He said that he took the interest to be contingent, for *Ruffel* might or might not avoid the note, and he doubted much whether, till so avoided, the note must not be taken against a third person to be the note of an adult. *Dwyer v. Edie*, *London Sittings after Hil.* 1788. *Park*, 432.

5. When an insurance is made upon a man's life who goes to sea, and the ship in which he sails is never afterwards heard of; the question, whether he did or did not die within the term insured, is a fact to be ascertained by the jury from the circumstances produced in evidence. *Et per Lord Mansfield*, if the case be so doubtful that the jury cannot form an opinion, the defendant ought to have the verdict, *Patterson v. Black*, *Guildhall*, *Hil.* 1782. *Ib.* 433.

6. Action on a policy on the life of *Sir James Ross*, for one year, from *October* 1769 to *October* 1770, warranted in good health at the time of making the policy. *Sir James* had received a wound which had occasioned a palsy, so that he could not retain his urine or *fæces*, which was not mentioned to the insurer; but he died of a malignant fever within the time, with which it was proved that this wound had no connection. *Per Lord Mansfield*. When an insurance is upon a warranty, it must be proved, that the life was in fact a good one, and so it may be though he have a particular infirmity. And the jury found a verdict for the plaintiff, under his lordship's direction. *Ross v. Bradshaw*, 1 *Black.* 312.

7. A man, troubled with spasms and cramps from violent fits of the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract. *Willis v. Poole*, *Guildhall*, *East.* 1780. *cor.* Lord *Mansfield* C. J.

8. In this species of contract the risk is entire, and if it be once begun there shall be no return of premium, though it should cease the very next day after it commenced. *Per Lord Mansfield*.

*field.* In *Tyrie v. Fletcher*, Cowp. 699. and *Bermon v. Woodbridge*, Doug. 758.

Of Insurance against Fire.

1. ACTION of covenant upon a policy of insurance from fire, in which there was a proviso, that the defendants *should not be liable in case the same should be burnt by any invasion by foreign enemies, or any military or usurped power whatsoever.* The defendants plead, 1st, The general issue, and 2dly, that the premises were burnt by an *usurped power.* Issue being joined thereon, it appeared on the trial, that on the 27th November a mob arose at *Norwich*, on account of the high price of provisions, and destroyed quantities of flour, but on reading the proclamation dispersed; that afterwards another mob arose, and burnt the malting office mentioned in the policy. A verdict being found for the plaintiff, subject to the opinion of the court of C. B. three judges, *Gould J. dissentiente*, were of opinion that this was not a burning within the proviso. *Drinkwater v. The Corporation of the London Assurance*, 2 Wils. 363.

2. Where the words in the policy declare that the insurers will not pay any damage by fire which happens by *civil commotion*, they are not answerable for damages by fire occasioned by an insurrection of the people for the purposes of general mischief, though not amounting to a rebellion. As where the mob in 1780 rose in the city of *London*, and burnt and destroyed Roman Catholic chapels, public prisons, and the houses of various individuals. *Langdale v. Mason et al. Guildhall*, Mich. 1780. cor. Lord Mansfield C. J.

3. Policies of insurance against fire are not in their nature assignable, and the interest in them cannot be transferred from one person to another without the express consent of the persons who make the insurance. *Lynch et al. v. Dalzell et al.* 3 *Brown's Park. Cas.* 497. *The Sadlers' Comp. v. Badcock et al.* S. P. 2 Atk. 554.

4. But by the proposals of the different offices, when any person dies the policy and interest therein shall continue to the heir, executor, or administrator respectively to whom the property insured shall belong; provided, before any new payment be made, they do procure their right to be indorsed on the policy at the office, or the premium to be paid in the name of the said heir, &c. *Park*, 449.

## Door.

### 16 Vin. 414. (C) Orders as to Children of Parents being rated.

THE defendant was indicted for refusing to obey an order of sessions for maintaining his two infant grand-children. It was moved in arrest of judgment that this is a new offence, created by 43 *Eliz. c. 2. s. 7.* for which a particular penalty and a specific method of recovering it is given, and that therefore the party cannot be punished by indictment. *Sed per Lord Mansfield* — In the present case a remedy existed before the statute, for disobedience to an order of sessions is an offence indictable at common law, so that there are two remedies, of which the present is one. *Rex v. Robinson, 2 Burr. 799.*

### 16 Vin. 424. (D) Poor Rates. By whom made, and how.

1. IF the overseers refuse to make a rate, the court of K. B. will grant a *mandamus* to compel them; but not to make an equal rate, for it is to be presumed the overseers will do justice; and if not, the proper remedy is by appeal to the sessions. *Rex v. Barnstable, 1 Barnard. 137.*

2. So the court refused to grant a *mandamus*, directing them to insert particular persons in the rate upon affidavits of their being left out to prevent their having votes for parliament men. *Rex v. The Churchwardens of Weobly, 2 Stra. 1259.*

3. A motion for a *mandamus* was made to direct the justices of *Canterbury* to rate personal property, but the rule was discharged on shewing cause. *Rex v. Justices of Canterbury, 1 Bott by Const, 112. pl. 154.*

4. A motion was made for a *mandamus* to the officers of *St. George's Middlesex*, to make a monthly rate, the rates now being made quarterly. Lord *Mansfield* said, it seemed full as well to make a rate for three as for one month, and discharged the rule. *E. 10 G. 3. 2 Bl. Rep. 694.*

5. The sessions have no original power to order an assessment to be made, but only if it come before them by way of appeal, and a rate was quashed on this ground without defence. *Rex v. Aberford, East. 2 Lord Raym. 798.*

# Of allowing the Rate.

1. **A** *Mandamus* issued to the justices to sign a poor rate made by the churchwardens and overseers. Before the return a motion was made to supersede it on several objections to its fairness, and that this would be speedier and better for the poor than to reserve the debate of them for a formal return. *Sed per cur.*—The two justices are necessary to sign the rate only by way of form, for it is the churchwardens and overseers who are to make it. Whether it be a fair rate is a question intended for the jurisdiction of the sessions, and not for our examination; and on the justices returning, that they could not allow the rate as not being proper, the court quashed the return, and ordered an attachment. *Rex v. The Justices of Dorchester, Stra.* 393. *Rex v. Uttoxeter, East.* 5 G. 1. S. P. 3 *Dougl. on Elect.* 142. in notes.

2. So where justices kept out of the way to avoid being served with a *mandamus* to sign a poor rate, the court granted an attachment for the contempt. *Rex v. Edwards and Symonds, Black. Rep.* 631.

3. *Mandamus* to the justices of *Wotton Bassett* to allow a rate, return, that ever since 43 *Eliz. c. 2.* the justices have appointed four, three, or two overseers within the borough, and that they have always made rates within their jurisdiction, and that the rate offered to them was made by overseers appointed by the justices of the county, and not of the borough. *Per cur.*—The return must be confirmed. *Rex v. Folly, Trin.* 27 & 28 G. 2. 2 *Bott by Const.* 62. pl. 80.

## (E) Poor Rates. Liable what. Personal Property. 16 Vin. 425.

1. **I**N the *King and Witney*, Lord Mansfield doubted of the opinion that a tradesman is taxable for his stock in trade, as is reported in *Reg. v. Barking, Ld. Raym.* 1280. 16 *Vin. Abr.* 426. pl. 7. and said that the question there was not before the court. 5 *Burr.* 2634 See also *Rex v. Justices of Canterbury*, 1 *Bott by Const.* 112. pl. 154.

2. A poors' rate was made, which on appeal the sessions quashed, stating, as the ground in their order, that it appeared to them that A. B. and C. were possessed as co-partners of stock in trade, and business of common brewers and maltsters in the parish of R. to the value of 4000*l.* for no part of which had the co-partners been assessed in the rate, and that it don't appear that stock in trade had ever before been rated in that parish. The court inclined to think the property not rateable, but quashed the order of sessions, on the ground that the justices had quashed instead of amending the rate. *Rex v. Ringwood, Cowp.* 326.



3. It is a very different question, whether personal property is to be rated to the utmost extent, or not at all. It would make the poor laws very oppressive if every man who has money in the funds should be liable, lawyers for their fees, soldiers for their pay, and the like. But where men are occupiers of houses and have a stock in trade, whether that may be taken into consideration is a different question; some personal estate may be rateable, *but it must be local and visible property, within the parish.* It would be material to state what has been the custom of rating; if the usage has been to take in stock in trade, there would be very good right to support it, *Per Lord Mansfield, Rex v. Churchwardens of Andover, Cowp. 550.*

4. On shewing cause against a rule for quashing an order of sessions confirming a poor rate, it appeared that the appellant was a clothier, and was rated in respect of his stock in the cloathing trade which he had in the parish. Lord Mansfield asked what usage had heretofore been in this place with respect to rating stock in trade; and being told that it was waived by agreement, he said it could not be, and that the case must be sent back to the sessions to state the usage, when it appearing to be the custom there to rate persons for their stock in trade, the court ordered the rate to stand. *Rex v. Hill, Cowp. 613.*

5. So where a butcher was rated for his stock in trade in a parish where the uninterrupted usage since 43 of Eliz. had been to rate it, the rate was affirmed. *Rex v. James Rodd, Cald. 147.*

6. An officer is not rateable to the relief of the poor for his salary as superintendant of salt works in the parish. *Rex v. Shellfleet, 1 Bott by Const, 109. pl. 152. 4 Burr. 2011.*

7. Ships are rateable in that parish where the port is from whence they trade. *Rex v. S. White and others, 4 Term Rep. 771. Nol. Rep. 112.*

8. The interest of money is not rateable. *Ib.* Neither is principal money unemployed. *Per Buller J. and Grose J. Lord Kenyon Ch. J. hesitants, Ashhurst J. absente. Ib.*

9. Neither is the salary of the collector of the customs, or the half-pay of a captain of the navy, or the pay of the master of a trading vessel, or the salary of a clerk to a merchant. *Ib.*

10. A man's household goods and furniture are not rateable. *Ib.*

11. But the stock in trade of a shopkeeper is.

### Profits rateable in respect of an Interest in the Soil

1. **K**ING Charles granted liberty by patent to erect light-houses at *Harwich*, and towards the maintenance of them certain tolls and duties were made, payable by all ships passing or coming into that harbour. Part of the duties arising from these light-houses are collected at *H.* the rest at different parts of the kingdom, and no other advantage but the tolls arise to the proprietor from the light-houses. The defendant did not reside in the parish but

but occupied the light-houses by two of his men, who were kept to attend the lamps, fires, &c. The court were of opinion that the defendant ought not to have been rated. That they have not rated the house but the tolls, which are not locally situated in the parish, and therefore are not rateable there. *Rex v. Martin Rebowe Esq. Mich. 12 G. 3. 1 Bott by Const, 115. pl. 158.*

2. A dock company convert land in a parish into part of a dock, they are rateable to the maintenance of the poor for so much of the annual profits of the dock as the proportion of its extent in the parish bears to the whole. *Rex v. The Dock Company of Hull, 1 Term Rep. 219.*

3. The defendant rented four acres of land, with buildings thereon, and a certain well of mineral water thereout arising at the yearly sum of 100*l.* the lands and buildings being of the annual value of 20*l.* He is rated to the poor as for an estate of 100*l.*, and the rate is good; for by Lord Mansfield, this is not a rate upon the profits of the well, but upon four acres of land, the value of which arises partly from the buildings and partly from the spring that produces the mineral water. *Rex v. Miller, Cowp. 619.*

4. A machine house, the principal annual value of which arises from the use of the steelyard in it for weighing waggons, &c. is assessable to the poor. *Rex v. St. Nicholas, Gloucester, Cald. 262. 1 Term Rep. 723. n.*

5. So an house with a carding engine in it, described in the rate as an engine house, and both let and occupied together, though it does not appear whether the engine is fixed to the building, is considered as an entire subject, and rateable to the poor to the extent of their annual value. *Rex v. Hagg, 1 Term Rep. 721. Cald. 266.*

6. A barge way and toll gate purchased by the city of London, by virtue of 17 G. 3. c. 18. are rateable to the poor in the parish where they are situated, as well for the tolls which become due there as the other profits, for they have an interest in the soil, in respect of which they take the tolls. *Rex v. The Mayor of London, 4 Term Rep. 21.*

7. A lessee of lead mines, whereon no rent is reserved other than a certain portion of the ore to be raised, is not rateable under the 43 Eliz., for the term used in it "coal mines" expressly excludes other mines, and there is a good ground for exempting them, as they are liable to much more hazard and expence. *Governor and Company for smelting down Lead v. Richardson, 3 Burr. 1341. Black. 349.*

8. The defendant was rated for his manor, consisting, as was stated, of quit-rents, fines for renewal of copyholds, and other casual fruit, and profits amounting in the whole to 130*l.* a-year. The court were of opinion that they were not rateable. *Rex v. Vandewall, 2 Burr. 991. Black. 212.*

9. Where a lessee under the crown of certain lead mines received the duties of lot and cope, which are paid by the adventurers,

turers, without any risk or expence to him in working the mines, he is rateable to the poor. *Rowls v. Gill & al. Cowp. 451. Rex v. St. Agnes, S. P. 3 Term Rep. 480.*

10. Trespass for taking the plaintiff's cattle on a distress for the poor rate. The question was, Whether the herbage and pannage of a forest were rateable. The cause was tried twice, when the judges at *nisi prius*, Mr. Justice Blackstone and Mr. Justice Ashbursh, were severally of opinion, that they were not rateable. But the court of King's Bench, on the authority of *The Corporation of Wickham v. the Mayor*, cited in 17 *Vin. Abr. 425. from 3 Keb. 540*, granted a new trial, that the point might be settled on a special verdict; but it seems not to have come on again. *Jones v. Maunsell, Dougl. 289.*

11. In *Lord Bute v. Grindall*, Lord Mansfield Ch. J. was of opinion that the herbage and pannage of a park which were granted to the ranger were not rateable, not having yielded him any profit. 1 *Term Rep. 358.*

12. The tithes of fish are rateable, though the rest of the fish caught may not be so; for the party receives a certain benefit arising from the tithe of fish in the parish, and runs no risk. *Rex Carlyon, 3 Term Rep. 385.*

13. A sum of money made payable annually by the owners of land in lieu of tithes is liable to the poor's rate. *Loundes v. Home & al. 2 Bl. Rep. 1252.*

14. So are payments in lieu of tithes settled under a compromise between a parson and a parish, and confirmed by act of parliament. *Rann v. Picking, Cald. 196.*

15. *Vide Rex v. Toms*, where a parochial assessment, settled by 19 G. 3. c. 60. for the vicar of *St. Michael's in Coventry*, was held not rateable. *Dougl. 401.*

16. The lessee of a private building covenanted by his lease to use it always as a chapel where the service for the church of *England* should be used, to pay the clergymen and other officers belonging to it, and defray all other expences of its support and maintenance, he receiving *all the emoluments arising from pews or seats therein*. This building is rateable to the poor. *Robson v. Hyde, Cald. 310.*

17. The warden of the Fleet is assessable to the poor's rate for the profits of his office. *Rex v. John Eyles, Hil. 24 G. 3. 1 Bott by Conit, 160. pl. 175.*

18. A. contracts with B. and others for certain way-leaves over their lands, and the liberty of making waggon ways in the most convenient direction towards a river for a term of years, paying a certain sum yearly. He obtains leave, but lays no waggon way in any of their lands, except a part in which he is tenant in common with B. He has also the use of a waggon way occupied by C., paying him so much *per ton* for the goods carried over it. He is not rateable to the poor for these way-leaves. For *per. cur.* it is only an easement, and if he were rated for his right of passage it would be a double rate, and this is not like the case of

of a grant of land to be used in a manner incompatible with any other mode of enjoying it. For if grass were to grow on the way, the owner of the land would have a right to feed his cattle on it. *Rex v. W. Jolliffe*, 2 Term Rep. 90.

### Ground yielding no Profit.

**P**ART of the ground on which houses had stood, being converted into an acre planted with trees for ornament and yielding no profit, is rateable to the poor. *Rex v. Gardiner*, Cowp. 79.

### The Tolls arising from Navigation. Where rateable.

1. **T**HE right of navigation of a river, with the tolls thereof, with power to erect sluices and staunches, is granted by letters patent. Tolls which are paid for passing through each sluice are rateable to the poor rate of the parish in which that sluice is erected, though the grantee resides elsewhere, and the tolls are collected in another parish. *Rex v. Cardington*, Cowp. 581.

2. A navigable canal extends 29 miles, 2790 yards of it lie within the local limits of the township of *Leeds*. The proprietors of it are rated to the support of the poor at *L.* for the tolls arising out of this navigation, at a sum considerably greater in proportion to the whole produce than that which the length of the canal in the township of *Leeds* bore to the rest of it. It was argued, that being evidently disproportionate to the extent of the navigation, the rate was bad, since the proprietors were not liable to be rated for more than the proportion of the tolls which became due in the township of *Leeds*, and here they were rated for more; so that *L.* received contribution from profits which accrued in other places, and for which the proprietors will be liable there. The court refused to quash the rate, on the ground that it did not appear to be manifestly unequal on the face of it, and they never enter into the question of inequality. But by *Buller J.* If a person have property in *Yorkshire*, and receive it in *London*, he shall not be rated for it in *London*. A toll must be considered to be paid at the place where it becomes due, and not at the end of every mile for that mile; for it is an entire contract to carry the goods the whole distance intended, and the hire is payable at the place to which by that contract they are to be carried. *Rex v. The Undertakers of the Aire and Calder Navigation*, 2 Term Rep. 660.

3. A barge way and toll gate is situated in the hamlet of *H.*, and the herbage and pasture of the way are let out to lease; the owners of the tolls have an interest in the soil, in respect of which they may be rated for the tolls, which are an adventitious profit arising out of the land, and such tolls, as become due in *H.* for navigating

navigating vessels there, are rateable there although collected in another parish. *Rex v. The Mayor, &c. of London*, 4 Term Rep. 21.

4. By a navigation act, the proprietors are entitled to a toll of 4s. per ton for goods carried from R. to N. and from N. to R., and to a proportionable sum for any less distance; and they are enabled to collect the tolls at any intermediate place on the navigation, and to distrain for them if unpaid. If goods are carried from R. to N., this is one integral voyage; the tolls are due at N. where the voyage is completed, and are rateable there, though they are collected at some intermediate parish. *Rex v. Page*, 4 Term Rep. 543. *Nol. Rep.* 35.

5. Where the tolls of a navigation were vested by statute in certain commissioners, to be applied by them to the purposes of the act, and no other use whatsoever, they are not rateable to the poor. *Rex v. The Commissioners of Salter's Load Sluice Navigation*, 4 Term Rep. 730. *Nol. Rep.* 90.

### Property of the Crown and the Public.

1. **R**OYAL palaces are not liable to be rated. *Rex v. Mathews*, *Cald.* 1.

2. Nor buildings applied to public purposes. *Lord Amberg v. Lord Sommers*, 2 Term Rep. 375.

3. The tanger of a royal park, in which there is inclosed arable land sowed by the king's servants with the ranger's corn, reaped by him for his own benefit, and the straw appropriated to the use of the king's horses, is an occupier of this land, and rateable as such. *Lord Bute v. Grindall*, 1 Term Rep. 338.

4. An under-keeper of a royal park, occupying separately, by virtue of his office, an house and land in that park, is rateable for them to the maintenance of the poor. *Rex v. Mathews*, *Cald.* 1.

5. Where the scite of a palace is demised to a subject for a certain permanent interest, the grantees who occupy it, are rateable to the poor. *Duke of Portland v. The Parish Officers of St. Margaret's, Westminster*, at nisi prius H. 33 G. 2. *Wynne's Analysis of the Poor Laws*, p. 60.

### What Places are not rateable as not having Occupiers.

1. **T**HE apartments in an hospital, inhabited by the sick or by servants who attend there for their livelihood, are not rateable, for there are no occupiers to rate. It would be absurd to call the poor objects of the charity so for this purpose; neither can the lessees of the hospital, in trust for the charitable purposes to which it applied, be considered as such. *Rex v. The Occupiers of St. Luke's Hospital*, 2 Burr. 1053. *Black.* 249.

2. But

2. But those apartments in them which are inhabited by officers belonging to the hospital, as the chaplain, may be rated as single tenements, of which these officers are the occupiers. *Ib. Eyre v. Smallpace*, cited *Burr.* 1059. S. P. Said also to be determined by all the judges in the case of *Greenwich* hospital.

3. Where houses belonging to an hospital had been rated to the poor, and the governors pull them down and erect buildings on the site for the use of the hospital, and inclose an area for the benefit of the patients, these premises are not rateable, for there is no occupier. *Ren v. Inhabitants of St. Bartholomew the Less*, 4 *Burr.* 2435.

4. A corporation, seized in fee for their own profit, are to be considered as occupiers or inhabitants within the 43 of *Eliz.*, and are rateable to the poor in their corporate capacity. *Rex v. Gardner, Corp.* 79.

5. An alms-house, wholly occupied by objects of a charity or their attendants, and of which no profit is made, although the absolute property of it is in the person who gives the alms, has no legal occupiers, and is not an object of taxation under the poor laws. *Rex v. Peter Waldo, Cald.* 358.

6. The colonel of a troop of the horse guards, in consequence of a warrant under the sign manual, took a lease of stables for the use of the regiment; no persons lived there, except two grooms paid to take care of the horses. The colonel is a trustee for the public, deriving no benefit to himself, and is not rateable as the occupier of the premises; and the property in question is to be considered either as part of the possessions of the crown or of the public, neither of which are liable to be rated. *Lord Amherst v. Lord Sommers*, 2 *Term Rep.* 375.

7. But the owner of stables, in the parish of *Mary-le-bone*, rented by the colonel of a troop of horse by the authority of the king, for the use of the troop, is liable to be assessed for them to the rates collected in that parish, under the 10 G. 3. c. 23. *Eckersall v. Briggs*, 4 *Term Rep.* 6.

8. Where the sessions found, in the case stated for the opinion of K. B., that the master gunner at *Seaford* was the occupier of the battery house there, which was the property of the crown, and that he was removable at pleasure from his office, the court held that being found occupier precluded the question of his not being rateable, though it might have been contended below that he was not occupier in the legal sense of the word. *Ren v. Hurdis*, 3 *Term Rep.* 497.

9. A private statute in 12 Car. 2. vested lands in trustees for the use of a free school and other eleemosynary purposes, and enacted that they should be free discharged and acquitted from and shall not be rated to any manner of public tax, assessment, or charge whatsoever. The court were of opinion that the poor rate was a public tax within the meaning of this act, and that the lands are not rateable. *Ren v. Scott*, 3 *Term Rep.* 602.

10. Chambers in an inn of court or of chancery are not liable to be assessed to the poor's rate of the parish in which they are situated, within the intent and meaning of 43 *Eliz. c. 2.* *Mason v. Horsenail et al. Comyn's Rep. 534.* *Vid.* also *Rex v. Justices of Peterborough, Cald. 238.*

56 Vin. 428. (G) Rates good or not and set aside in what Cases.  
Inequality on the Face of it.

1. **I**T was moved to set aside an order of sessions confirming a rate, whereby the occupiers of land were assessed at three-fourths of the yearly value, and occupiers of houses at only one-half, as being on the face of it unequal. *Sed per cur.* Here is no apparent inequality, and we are not to presume it. There may be reasons to make a difference between lands and houses. *Rex v. Brograve, 4 Burr. 2491.*

2. On an appeal against a rate the sessions confirm it, and state the objection to be, that no difference was made in assessing tenements and farms, consisting of lands and cottages or dwelling-houses, whereas the custom was to rate the former in the proportion of one penny in the pound, and the latter of three farthings, the clear income of the latter being to the former in that rate. *Per Lord Mansfield.* The question is, does the rate appear on the face of it to be unequal? Unless it manifestly does, the court will presume it equal. Rate affirmed. *Rex v. Butler et al. Cald. 93.* *Rex v. Hardy, Cowp. 579. S. P.*

3. A rate was appealed against as unequal, because lands were rated at a penny and houses at three farthings in the pound. The sessions quash the rate, and order a new equal assessment to be made, which was affirmed in *B. R.* Lord Mansfield C. J. The court has laid down no general rule as to the mode of assessing houses and land. The proportion in which they contribute must ever depend upon local circumstances, and if nine-tenths of the burthen arise from houses, it ought to influence the judgment of the court below in adjusting the proportion. *Rex v. Sandwich, otherwise Swannage, Cald. 105.*

Where raised for other Purposes than supporting the  
Poor.

1. **A** Rate cannot be made to reimburse an overseer, but only to raise money for the relief of the poor; for the statute is expressly so, and must be pursued. An overseer is not bound to lay out money till he has it; if he does, he must make a new rate, and out of that he may retain. But a *mandamus* cannot be granted directing them to make one for the purpose. *Townry's case. 2 Salk. 591.*

2. So

2. So where the title of a rate was "an assessment, &c. for the necessary relief of the poor, and towards payment of money borrowed for repairing and rebuilding the workhouse." The court were of opinion that one of the purposes for which it was made being to repay money borrowed, it must be quashed on the authority of *Towney's case*. *Rex v. Worrell*, Dougl. 111.

3. Overseers may make a rate to reimburse themselves for law expences necessarily incurred. *Rex v. Micklefield*, Hil. 25 G. 3. 1 *Bott by Const*, 78. pl. 103.

Where it should be quashed. Where amended.

1. **A** PPEAL against a rate, because many manufacturers of blankets and other traders were not assessed in it for their stocks in trade. The rate was quashed by the sessions on that ground. The court held the order of sessions to be wrong in quashing the rate, for they ought to have added those persons and that property which they thought to be illegally omitted, and quashed their order. *Rex v. Witney*, 5 Burr. 2634. *Bott*, 34. 2 *Black*. 709.

2. So where the stock in trade of common brewers and maltsters was omitted, and the rate quashed on appeal, the court quashed the order of sessions, because they should have amended the rate. *Rex v. Ringwood*, Cowp. 326.

3. But where a rate was quashed because the owner of a number of houses was rated for them in gross, and not the occupiers severally, the court were of opinion that the sessions did right, and could not have amended it, for the insertion of the names would alter the other assessments. *Rex v. St. Catherine's, Gloucester*, Trin. 16 Geo. 3. B. R. Cited in *Rex v. Maddern*, H. 27 G. 3. and relied upon by *Ashurst J.* in giving the opinion of the court.

4. Where a rate was quashed for assessing land and houses in an unequal proportion, the court were of opinion that the justices could do nothing but quash the whole rate. *Rex v. Sandwich or Swannage*, Cald. 105.

5. And where a rate was quashed by the sessions because the name of the vicar was omitted, and he was not assessed for the small tithes, the court of K. B. were of opinion, upon deliberation, that the sessions did right in quashing the rate; for it is impossible to draw the line between the omission of one person and that of fifty; and it is not enough to say that the more money is raised the longer it will last, for it may be an inconvenience to many to pay at once double the sum. *Rex v. The Overseers of Maddern*, 1 Term Rep. 625. *Rex v. St. Agnes*, 3 Term Rep. 480. S. P.



## Want of Notice to Persons inserted in it.

1. **I**F the quarter sessions order a rate to be amended, by inserting the names of persons who have been omitted, and the order does not state that these persons had notice of the appeal, or that they litigated the question, it is bad; for they are without redress, being necessarily precluded from appeal thereby. *Rex v. Churchwardens of Andover, Cowp. 550.*

2. But on an appeal for omitting the vicar in the rate, on which ground it was quashed by the sessions, the court were of opinion that no notice need be given to the person who is omitted; for the 17 G. 2. c. 28. only requires it to be given to the churchwardens or overseers, and says nothing of any other person; and the complaint is merely against them for having done injustice, and by those means imposed a greater burthen on those who are rated than they should have done. *Rex v. Maddern, 1 Term Rep. 625.*

16 Vin. 489.

## (H) Remedies for the Recovery of Rates.

1. **A** Person, who was assessed to the poor rate, died intestate, and administration was granted to J. S., after which two justices executed a warrant reciting the assessment, and that it appeared on the oath of the overseers that the sum assessed had been demanded of the deceased, and of his widow and representative, and that they refused to pay. The goods being distrained under this warrant, the administrator brought trover, and the court gave judgment for the plaintiff on the ground that being the representative of the intestate, he should have been summoned before the justices. But the two judges in court seemed also to incline to the opinion that the goods of the person assessed could not be charged in the hands of his representative, if the *teste* of the warrant was posterior to the death; and *Wilmot J.* cited the opinion of *Eyre Ch. J.* in *Wallis v. Hewit, 5 Geo. 2.* to that effect. *Stevens v. Evans, 2 Burr. 1152. Black. 284.*

2. Justices of peace made a warrant to levy a poor rate of J. S. It was directed to the constables of the parish of A., where J. S. had lands, but no chattels. The constables levied it upon his goods at his house in the adjoining parish of B. within the same county; and *Holt C. J.* ruled, at the assizes at *Hertford*, that they were well levied. *Hampton v. Lammas, Lord Raym. 735.*

3. *Averia caruæ* are distrainable for a poor rate, although there are other things on the ground more than sufficient to answer the value of the demand. *Hutchins v. Chambers et al. 1 Burr. 579.*

4. A second distress may be taken under the same warrant, the first not being sufficient to discharge the rate, although enough might have been taken on the first if the distrainer had thought proper. *Ib.*

g. Motion

5. Motion for a *mandamus* to the justices of *Middlesex* to sign a warrant of distress for levying a poor rate; upon shewing cause, the affidavits stated that it had been the custom not to grant warrants without first summoning the party to shew cause, and that they had refused on that account. The court were of opinion that this was not a sufficient cause to prevent the granting the writ, and that the justices, if they thought it sufficient, might shew it upon the return. *Lee C. J.* and *Foster* seemed of opinion that it was insufficient, and that they ought to sign the warrant without such summons, for there is no direction in the 43 *Eliz. c. 2. s. 4.* to do it. *Rex v. The Justices of Middlesex, 1 Bott by Conf. 207. pl. 208.*

6. Motion for a *mandamus* to compel the defendants to grant a warrant of distress to levy a poor rate. It was shewn for cause that the rate was not published in the church on the Sunday next after it was allowed, pursuant to 17 *G. 2. c. 3. s. 1.* and was therefore a nullity. *Per cur.* As the *mandamus* would be no justification to the magistrates, we must take care not to compel them to do an act which may not be warranted by law. There is here a radical defect in the rate which nothing can cure. Rule discharged. *Rex v. Newcomb and another, 4 Term Rep. 368.*

7. If a landlord tender the poor rate for his tenant, the overseers must receive it, and a warrant ought not to be granted to distrain upon the tenant. *Darby v. Cofens et al. Dougl. 426.*

### Remedies against unequal Rates.

1. A *Certiorari* won't lie to remove a poor rate, for if they were removable the poor might be starved while the rates are depending. The remedy is by appeal, or by action, when a distress is taken. *Rex v. Uttoxeter, Stra. 932. Cas. of S. 317. Rex v. The Justices of Salop, 1 Sess. Cas. 201. Stra. 975. Rex v. King and others, 2 Term Rep. 235.*

2. If a person be over-rated and appeal, the sessions may amend the rate by lessening the sum at which he is assessed, and need not quash it, otherwise the 17 *G. 2. c. 38.* would be nugatory. *Rex v. Chesbunt, 2 Term Rep. 623.*

3. On a motion for a *mandamus* to the overseer to collect a rate made on the rector of the parish, grounded on affidavits that the overseers had refused, assigning for cause a parol agreement between the inhabitants and the late rector, that the latter should forego his small tithes, and that the assessment of the latter in the rate should never be collected. The court refused it, saying that the party had a remedy by indicting the overseers. *Rex v. The Overseers of the Poor of St. Mary, Norwich, Nol. Rep. 28.*

4. A plaintiff, in an action for executing a warrant of distress upon a poor rate, cannot avail himself of any objection to the rate, but if he thought himself aggrieved, he should have appealed. *Per Lord Mansfield C. J. Hutchins v. Chambers et al. 1 Burr. 579.*

5. A distress for a poor rate for lands not in the plaintiff's occupation may be replevied, notwithstanding the sessions on appeal had confirmed the rate. For the justices exceeded their jurisdiction, and their determination is a nullity. *Milward v. Caspary*, 2 Black. 1330.

6. Justices need not be joined with the overseers in actions of replevin for a distress taken for a poor rate, for they have only a special jurisdiction, upon the application of the overseers, to enforce payment of a tax which the overseers are presumed to have regularly made. *Id.*

7. But in trespass for taking a distress for a poor rate, the point was whether the plaintiffs, who were rated, were joint occupiers. *Buller, J.* before whom the cause was tried, held that to be a question for the sessions, and not to be gone into in that action. *Kettle et al. v. Walton, Huntingdon Lent Assizes 1780*, cited in *Rex v. Stotfold*, 4 Term Rep. 596. *Nol. Rep.* 70.

16 Vin. 430.

### (I) Rates of Parishes in Aid.

1. **A**N order for the contributory parish to make a rate at 6d. in the pound is ill for incertainty; it should be to raise such a sum certain. *Rex v. Telfcombe, Stra.* 314.

2. Order of sessions, reciting that the parish is not able to maintain its own poor, nor any parish within the hundred to contribute, therefore the justices at the sessions tax other parishes in another hundred within the same county, it was moved to quash it upon the ground that 43 *Eliz.* gives no authority to the sessions to charge people out of hundreds till two justices have inquired whether any parish within it can contribute. But by the court, the two jurisdictions are original and distinct. The two justices have no power out of the hundred, nor the sessions within it, and the order was confirmed. *Rex v. Percivall, Stra.* 56.

3. Two justices tax the inhabitants of the tithing of *Milland* in aid of the parish of *St. Peter's, Cheeshill*, in the same county. The sessions confirm the order, and state that this tithing lies in the same liberty of the foke, with the parish. The court of K. B. were of opinion that they were not bound down by the particular word "*bundred*," which is used in the statute; but that if the same division be called by any other term which is equivalent, it is sufficient. And having referred it back to the sessions for a more particular statement, it appearing substantially to be an hundred, both orders were confirmed. *Rex v. The Tithing of Milland*, 1 Burr. 576.

4. Part of a parish, maintaining its own poor separately, and having distinct overseers, is, if unable to maintain its own poor, entitled to have a rate in aid under the equity of 43 *Eliz.* *Rex v. T. Holbeche Esq.* 4 Term Rep. 778. *Nol. Rep.* 122.

5. But the justices of the county cannot rate a parish within their jurisdiction in aid of such vill, if it be situated in a district possessing

possessing an exclusive jurisdiction, for they have no means of investigating the truth of the complaint. *Rex v. Holbeck Esq.* 4 Term Rep. 778. *Nol. Rep.* 122.

6. It is optional in the justices to make such a rate either upon the whole parish or to tax particular persons within it. *Ib.* *Ib.*

*Vide Overseers, Order of Removal, and other proper titles.*

## Relief of the Poor.

16 Vin.  
tit. Poor.

1. **W**HERE a bastard child is born and the parents neglect to provide necessaries for it, an order of justices is not necessary to make the parish officers provide for it. *Hays v. Bryant*, *H. Black. Rep. C. B.* 253.

2. An order to pay 3s. weekly to a person so long as he shall continue poor is bad, for by the statute it ought to appear that they are poor and impotent. *Rex v. Highworth*, *Stra.* 10. *Rex v. Stoke Pursey*. *Rex v. Tipper*, *S. P.* *Ib.*

3. Order of sessions made on the overseers to pay a surgeon's bill for curing certain poor under their care, quashed, for the sessions have no power to make such orders. *Rex v. Colbatch*, 1 *Barnardist.* 46.

4. So an order upon the parish officers by two justices to pay 5s. on an account of a poor inhabitant of the parish when he was in gaol, and for payment of his surgeon's and nurse's bill, was confirmed by the sessions, but quashed by the court. The officers had given their pauper relief by employing the persons to whom these debts were due, and they have their remedy by action. *Rex v. Woodsterton*, 2 *Barnardist.* 207. 247.

5. The sessions cannot make an original order upon the parish officers to pay a weekly allowance to a pauper. *Rex v. Winslip and Greenwell*, 5 *Burr.* 2677. *Sed vid. Rex v. North Shields*, the opinion of *Willes J.* *Doug.* 319. and the note there, as also *Cald.* 72. stating that the court came to no such determination.

6. An order of maintenance is bad if it be not stated or found to have been made upon oath. *Rex v. Winslip and Greenwell*, *Cald.* 72.

7. There is no legal authority vested in the magistracy of the county to make an order for the relief of poor persons *refusing to go into the parish poor house*. *Rex v. Carlisle*, cited by *Mr. Wallace* from his own note in *Rex v. Winslip and Greenwell*, *Cald.* 72.

8. A woman having four children asked relief for three, all under the age of seven years, and obtained a justice's order for the purpose, which was confirmed on an appeal to the sessions. The overseers refused to pay, but offered to take her and her three children into the workhouse established according to 9 G. 1. c. 7. *Willes* and *Buller* Justices, were of opinion that the whole family should not go to the workhouse because one of them wanted relief. *Asbhurst J. contra.* But the order of sessions was quashed *per tot.*

*cur.* because no appeal lies from an order of maintenance. *Rex v. North Shields, Cald.* 68.

9. The churchwarden and overseer of *S.* were indicted for disobeying an order of a justice, for the payment of a weekly sum to *M. G.* for the maintenance of her bastard child. The question was, whether the defendants were bound to obey the order, the mother having refused to go into the workhouse herself, as she only wanted relief for the child, and held that they were bound, for the mother was not obliged to go into the workhouse under 9 *G.* 1. c. 7. s. 4. *Rex v. Haigh & al.* 3 *Term Rep.* 637.

10. On an order of maintenance where the money is directed to be paid weekly, it is due at the beginning of the week. *Rex v. John Fearnley*, 1 *Term Rep.* 316.

11. Under the 9 *G.* 1. c. 7. s. 4. which enables the churchwardens and overseers, with the consent of the major part of the parishioners, to contract for the providing for the poor, it is sufficient if the majority of the churchwardens and overseers concur in the contract, although some of them dissent. *Rex v. Beeston*, 3 *Term Rep.* 592.

### Of Maintenance of the Poor by Townships, &c. according to 13 and 14 *Car.* 2.

*Vid. Rex v. Justices of Middlesex. Peart and Westgarth, &c. supra, tit. Overseers.*

1. A Township for 60 or 70 years (and before for any thing that appeared to the contrary) had separate overseers, and separately maintained its own poor. They are entitled to maintain their poor separately from the parish at large. *Rex v. Leigh*, 3 *Term Rep.* 746.

2. If it was formerly inconvenient for the parish at large to maintain their own poor jointly, though it were convenient for them to do so now, the court won't assist them in overturning the old practice. But if it should appear that the parish had enjoyed the benefit of the 43 *Eliz.* yet if they could not now maintain their own poor jointly, the court would permit them to divide themselves, provided there be such legal divisions in the parish as are capable of supporting their own poor separately under the provisions of the statute of *Car.* 2. *Per Buller J. Ib.*

3. A hamlet within a parish had immemorially a separate constable, a separate churchwarden, and from 1648 separate overseers, the number of which, together with those of the rest of the parish, were more than four. Both districts have had separate rates immemorially, and have raised money in a settled proportion of the whole of the expences incurred by the poor of both parts between them ever since 1749, which money is separately distributed and laid out within the limits of each, by the overseers of each: but the whole expences, when incurred, are computed into one integral sum, and

and the overseers of each part account with each other. Orders of removal and certificates have been frequently made by and to the hamlet, but never by or to the rest of the parish. They have a joint poor house, and the justices in the case stated for the opinion of the court of K. B. don't find it as a fact that the parish could not reap the benefit of the 43 Eliz. *Per cur.*—This is only one district, affording one integral fund for the poor of both parts of it. The two parts account with each other, and when one overpays its proportion, it is repaid by the other, and it is merely for their own convenience that they subdivide themselves; every fact establishes that they can have the benefit of 43 Eliz. and the contrary is not stated as a fact. Those districts therefore cannot now be subdivided, and maintain their own poor separately. *Rex v. Newell*, 4 Term Rep. 266.

## Portions.

[A]

### (A) Raised how. By Sale or Mortgage, &c.

16 Vin. 432.

1. **DIRECTING** a gross sum to be raised, does not imply that it shall be raised at once, for it may be raised out of the rents and profits, and so laid up till it amounts to that sum. 1 Atk. 550. *Oboden v. Okoden*. Nov. 1738.

2. Trust of settlement or articles after marriage to raise portions for daughters on failure of issue male, to whom the estate was limited in tail: decreed to be raised after failure, notwithstanding a general release by a daughter, the settlement not being known. 2 Vesf. 305. 1751. *Hylton v. Biscoe*.

3. Portions decreed to be raised under a term in remainder after an estate tail and power of revocation. 2 Vesf. 310.

4. Marriage settlement on husband and wife for life, and trust term if no issue male, or if all should die without issue male before twenty-one, to raise portions for daughters, &c. A son attained twenty-one, but died in the father's lifetime without issue male: the portions are not raiseable. 2 Vesf. 331. *Worsley v. Earl Granville*. July 1751.

5. Power to father to raise for younger children not exceeding 3000*l.* if no appointment the estate charged with 300*l.* for sons at twenty-one, daughters at twenty-one or marriage. Nothing vested in the father's life, and the representative of one who attained twenty-one and became elder, but died in the father's life, not entitled to a share. 2 Vesf. 530. 1754. *Loder v. Loder*.

6. A power in a settlement to raise a portion for a younger child at such time as the parent should direct, he directs it to be raised when she is fourteen, and she dying, files his bill for it as her administrator, the portion shall not be raised for the father. 1 Bro. Ch. Rep. 395. *Lord Hinckinbroke v. Seymour.* July 1784.

36 Vin. 434.

(B) *At what Time to be raised or paid.*

1. **W**HERE there is a term for years for raising daughters' portions, payable at a certain time, and a vested interest, they shall not stay till the death of the father and mother; but the court will lay hold of the slightest circumstance in a settlement, that shews an intention to postpone the raising them in the life of the father and mother. 1 Atk. 549. *Stanley v. Stanley*, Mich. 1737.

2. Where a particular time has been appointed for the payment of a portion, the court has enlarged the power of trustees to raise it within the time. *Ibid.* 551.

3. A portion given to one payable at a certain age, and if he die, to another, without mentioning any age; if the first die before the time of payment, it vests in the second immediately. *Ibid.* 556.

4. *J. C.* by will created a term of one hundred years in trust out of rent, or by mortgage to raise portions of 100*l.* for each of the daughters of his son *J. C.* payable at eighteen, or day of marriage, and 6*l.* a-year for their maintenance till their respective portions became payable, with a proviso that his son *J. C.* may make a jointure of all or any part of the premises, and also a proviso that in case such person who shall be next in remainder expectant on the term of one hundred years shall pay to the daughters of *J. C.* their portions of 100*l.* before the same are due, then the term of one hundred years to cease. *J. C.* had two daughters but no son, and left a widow who had a jointure of the whole premises; *E. C.* the grandson of the testator by his second son, is become tenant in tail under the will; *G. H.* the daughter of *J. C.* who married eighteen years since, brought the bill to have her portion raised immediately: the portions cannot be raised in the lifetime of the jointress so as to affect her, for when *J. C.* executed the power the estate arose out of the will of *J. C.*, and is precedent to the one hundred years term. 2 Atk. 355. *Hall v. Carter*, July 1742.

5. Of late the court has refused to raise daughters' portions in the lifetime of the father, and some times the court has refused in favour of the remainder-man. 2 Atk. 356. 1742. *Hall v. Carter*.

6. Conveyancers now insert negative words to prevent portions being raised in the father and mother's lifetime. *Ibid.* 357.

7. The trust of a term here was for raising portions for a daughter in default of issue male, payable at twenty-one or marriage;

stage; the mother died leaving no son, and only one daughter, the plaintiff's wife, who, with her husband, brought this bill against the father and the trustees to raise the portions immediately: the court held, she was not entitled to have it raised in the father's lifetime. 3 Atk. 39. *Stevens v. Detbick*. Feb. 1743.

8. The court reluctantly raises portions or interest on them out of reversionary terms. 3 Atk. 416. 1746. *Lyon & ux. v. Duke of Chandos*.

9. Portions are not to be raised for the representative of a child dying before he wanted it. 2 Ves. 209. 1750. *Lord Teynham v. Webb*.

10. Portions by will are governed by rules from the civil law or ecclesiastical court, which are not applicable to a deed. *Hubert v. Parsons* 2 Ves. 262. 1751.

11. The contruction of portions is when the children want them. *Ibid.* 273.

12. Settlement by father and son, after marriage of the son, on the son and his wife for their lives, remainder to Robert the grandson and his heirs male, in strict settlement, remainder to trustees for two hundred years; the trust was declared to raise a portion for the daughter of the son on the death of the grandson without issue male; a power was given to the grandson to jointure; the grandson marries and executes the power and died without issue male; held, the portion not raiseable till after the death of the jointress. *Ambl.* 335. *Churchman v. Harvey*. June 1757.

13. Portions for daughters in case of failure of issue male ordered to be raised in the lifetime of the mother. *Ambl.* 633. 1756. *Smith v. Evans*.

14. Portions charged on a reversionary fund shall not in general be raised till the person comes into possession; yet when it is expressly directed under a power, that they shall be raised as soon as may be, they shall bear interest from the death of the testator. 3 Bro. Ch. Rep. 267. *Conway v. Conway*, Trin. 1791.

(C) How much to be raised and paid. And Maintenance in what Cases. 16 Vin. 439

1. PORTIONS charged on estates to pay in equal rates and proportions are meant to be paid *pro rata* as to the value of the estates. 4 Bro. Ch. Rep. 286. *Wardell v. Wardell*. East. 1793.

2. Settlement on marriage to the use of the husband for life, remainder to trustees for five hundred years in trust after the death of the husband and not before, unless with his consent as therein mentioned, to raise portions for younger children, to be paid in such shares and at such times as the husband and wife should appoint, in default of appointment to be paid, if but one besides an eldest or only son, 5000*l.* if two 6000*l.* if three 8000*l.* and



## Portions.

and if four or more 10,000*l.*, equally to be paid respectively at twenty-one or marriage, if daughters, if after the age of sixteen, if such times of payment happen after the death of the husband; if in his lifetime, then within twelve months after his decease and not before, unless with such consent; provided, that if any of such younger children should die before his, her, or their portions should become payable, so that the number should be reduced to less than four, no more should be raised than what would make the whole sum for the portion of the survivor or survivors of such younger children, equal to the sum originally limited for the portion or portions of such child or children, if one, two, or three. Three younger children only survived their father, but more than four had attained twenty-one, the sum to be raised is 10,000*l.* 3 *Ves. jun.* 51. *Willis v. Willis.* Feb. 1796.

3. The court leans against the construction for raising portions or maintenance out of a reversionary term; and upon that principle, when the term fell into possession, and the portion was raised, refused to charge the difference between the sum annually allowed by the infant's grandfather for her maintenance, and the sum charged. 4 *Ves. jun.* 440. *Lady Clinton v. Lord Robert Seymour.* March 1799.

### 16 Vin. 442. (D. 2) Maintenance or Interest, payable in what Cases and from what Time.

1. **T**HE principal of a portion directed to be paid to sons at twenty-one, to daughters at twenty-one or marriage, with interest at 5 *per cent. per ann.* from the death of the father, to the payment thereof; the interest ought not to accumulate till the portions are payable, but to be paid annually, for it is given as a recompence in the meantime, till the principal becomes due. 1 *Ash.* 553. *Boycott v. Cotton.* Nov. 1738.

2. Whether a portion charged on land be given with or without interest, by deed or will, if the person die before it becomes payable, it shall sink in the estate. *Ibid.* 155.

3. But the maintenance is a present charge, and is not postponed till the term comes into possession, and no harm can arise from mortgaging the reversion, as the arrears must be satisfied the moment the terms come into possession. 2 *Ash.* 357. 1742. *Hale v. Carter.*

4. And the defendant cannot redeem the term and exonerate the estate without paying interest for the portions the moment they become due. *Ibid.* 358.

5. Portion on real estate carries interest, though not mentioned, *Earl of Pomfret v. Lord Windsor.* 2 *Ves.* 487. 1752.

6. Portions for younger children under a settlement; the father provides otherwise for one, intending 10,000*l.* each for the rest. They are confined to that, and are not also to claim an equivalent for the other share out of the provision made. It would be

## Portions.

475.

be otherwise if they had no other satisfaction. 2 *Ves.* 123. 1750.  
*Duke of Bridgewater v. Egerton.*

### (E) Who is entitled by the Limitation, and how. 16Vin 444

**B**Y settlement on the marriage of *H. A.* with *J. C.*, in case there was no issue male, and there should be daughters living at the death of the father, who should attain twenty-one, or be married, then such daughters should have 2000*l.* a-piece; there were no sons, and three daughters only; the defendant, who was one, married *A. D.* and previous to his marriage covenanted to assign, with his wife's consent, 500*l.* to trustees in trust after the death of *A. D.*, and the defendant to pay it amongst the children of the bodies of the defendant and *A. D.*, and that he should, after the marriage, assign to the trustees all the money and securities for it then due and belonging to the defendant. *H. A.* died in 1744. *A. D.* in 1745, intestate, to whom the defendant administered and received the 2000*l.*; the children, who are a son and a daughter, have a right to the portion, and decreed to be secured for their benefit. 3 *Atk.* 530. *Busb v. Darway.* July 1747.

### (G) Vested in what Cases. 16Vin. 444.

1. **O**N a settlement previous to a marriage, the trust of a term was in case the husband should have no issue male, and there should be issue daughters, *Uc.*, to raise, if two daughters, 25,000*l.*, to be paid to them when they attain twenty-one or are married, but not to be raised till after the death of their grandfather; the father died, and left issue two daughters only; the grandfather is dead; bill by plaintiff in right of his wife, one of the daughters, for 12,500*l.* and interest, from the time of the marriage: held, the portion vested at the marriage, and therefore interest was decreed. 3 *Atk.* 416. *Lyon v. Duke of Chandos.* Feb. 1746.

2. Portions in a settlement of a term after the mother's death for the defendant, to grow due and payable at twenty-one or marriage, one daughter after twenty-one and marriage, died in the lifetime of the mother; her portion shall go to her representative, and not to her sister. 1 *Ves.* 208. *Emperor v. Rolfe.* Feb. 1748.

3. By marriage settlement 1500*l.* were provided for younger children in such shares as the parents should appoint, in default of appointment to all the children after the death of the wife; the parents afterwards made an appointment excluding one child: this deed vests the portions in the other children, born or to be born. 1 *Bro. Ch. Rep.* 162. *Maybew v. Middleditch.* Trin. 1782.

4. Portions by a marriage settlement to be paid, transferred, or assigned to the sons at twenty-one, to the daughters at twenty-one,

one, or marriage, if after the decease of their parents, with survivorship among them, if any should die before the share or shares should become payable, assignable, or transferable, and a limitation over, if there should be no child or children living at the death of the survivor of the parents, or being such, all should die before the fund should become so as aforesaid payable, assignable, or transferable. Whether a child attaining 21 takes a vested interest in the life of the parent? *Quere.* 5 *Ves. jun.* 452. *Legb v. Haverfield.* 1809,

16 Vin. 451. (K) Lapsed in respect of the Settlement not being made.

1. **T**HE wife's portion has been decreed to the husband, though he has not made a settlement adequate to it, where the settlement was before marriage; otherwise on a voluntary settlement after marriage. 2 *Atk.* 448. *Laney v. Duke of Athol.* Nov. 1742.

2. The husband by marriage articles agrees to settle an estate, and the wife's portion is to remain in trustees, till the settlement. No settlement is made, nor any estate applied, and the husband dies. The right to the portion survives to her, and the issue are not entitled to take it out of her hands. 1 *Ves.* 376. *Pyke v. Pyke.* Jan. 1749.

For more of *Portions*, see *Charge, Devise, Marriage, Powers*, and other proper titles.

(F) Privileges of Possession.

1. **W**HERE *A.* drew on *B.* at *London*, and sent bills to answer the same, directing them to be put to a particular account, and *B.* became bankrupt before paying the bills drawn on him, his assignees were decreed to deliver the bills sent to him to answer the said drafts; and Lord *Hardwicke* said he remembered a case in the Common Pleas where goods, consigned to a factor, were sold, and notes, instead of money, given for them, and the principal was held to be entitled to the notes. *Ex parte Dumas*, 1 *Atk.* 232. and 2 *Ves.* 582. *S. P.* *Zenk v. Walker*, 2 *Bl. Rep.* 1154. and *Ex parte Ourfell*, *Amb.* 297.

2. Where

2. Where a person, who had repaired a ship belonging to a bankrupt, gave up the possession, he was held to have lost his lien thereon; if the repairs had been in a foreign port, while on a voyage, it would have been otherwise. *Ex parte Shank*, 1 Atk. 34.

3. Where a miller had claims upon a bankrupt for grinding former quantities of wheat, yet he was held not to have a lien on what in his possession, except for the price of grinding it alone. *Ex parte Ockenden*, 1 Atk. 235.

4. A packer was held to have a lien on the goods in his possession for all sums due to him as such, although not on other goods; for, by the custom of the trade, he is in the nature of a factor. *Ex parte Deeze*, 1 Atk. 128. But see observations on this case, 4 Burr. 2222.

5. A factor was held to have a lien on the goods in his possession for the general balance. *Kruzer v. Wilson*, at the Rolls, 12th March 1754, cited in 1 Burr. 494. *Ambl. 252. S. P. Fowcroft v. Devonshire*, 2 Burr. 931.

6. A dyer, having cloth in his possession, was held to have a lien on it only for the price of dying it, not for his general balance for dying other clothes. *Green v. Farmer*, 4 Burr. 2215.

7. A factor, who had become surety for his principal, sold goods for him before his bankruptcy, but did not receive the money till after; and the vendee having paid over the price to him, after notice from the assignees to the contrary, an action was brought against him; it was held that the factor had a lien on the money in the hands of the vendee for the amount of the sum for which he was surety, though not then paid; and therefore that the action did not lie. *Drinkwater v. Goodwin*, Cowp. 251.

8. Where a navy bill, payable to the defendant, was lodged with the plaintiff as a security, and he delivered it over to the defendant in confidence that he would accept a bill drawn upon him to the amount; although the plaintiff could make no use of the navy bill himself, yet he was held to have a lien upon it in the defendant's hands; and he, having received the amount, was compelled to pay over the same. *Pierfon v. Dunlop*, Cowp. 571.

9. A vendor, before actual possession by the vendee, has a lien on the goods he sends, and if he can get them *in transitu* has the benefit of that lien. *Berkett v. Jenkins*, B. R. 11 G. 3. cited in Cowp. 295, 296.

10. Goods were delivered to a person claiming them wrongfully, who paid freight and other charges thereon; it was held that he had no right to retain the goods for those charges. *Lempriere v. Pasley*, 2 Term Rep. 485.

11. S. left by his will certain plate to trustees to the use of his wife for life, remainder over; she pawned the plate to the defendant, who was ignorant of the settlement; on a claim by the remainder-man, the counsel for the defendant admitted that he could not retain. *Hoare v. Parker*, 2 Term Rep. 376.

12. Where

12. Where goods are sent to a factor, but not in his actual possession, he has no lien thereon for his general balance, and the goods may be stopped *in transitu* if he becomes bankrupt. *Kinlock v. Craig*, 3 *Term Rep.* 122. 787.

16 Vin. 458,

(G) Sufficient for what Purposes as to Actions.

1. IN an action by an owner of an ancient ferry against a person who erects a new ferry near his, the plaintiff may declare on his possession; and he need not set forth in his declaration that he keeps boats and ferrymen sufficient to carry passengers over. *Blisset v. Hart, Willes*, 508.

2. Possession is a sufficient title to the plaintiff in trespass *vi et armis*; and where any person is in possession, this (and not trespass on the case) is the proper action for any injury done to the land or the profits of it. *Harker v. Birbeck*, 3 *Burr.* 1556.

3. Possession for above sixty years of a pew in a church is not a sufficient title to maintain an action upon the case for disturbance in the enjoyment of it. *Stock v. Booth*, 1 *Term Rep.* 428.

4. A possession for twenty years is like a descent which tolls entry, and gives a right of possession, which is sufficient to maintain an ejectment. *Per Holt C. J. Vide Run. on Ejectm.* 59.

16 Vin. 459.

(H) Sufficient as to other Purposes than Actions.

1. **POSSESSION** gives a right against every man who cannot shew a good title: the party therefore who would change the possession must first establish a legal title to it.

2. By one of the statutes of limitations (21 *Jac.* 1. c. 26.) none shall make an entry on land but within twenty years after the right or title shall first descend or accrue. But the act hath the usual savings for infants, feme-coverts, &c. Therefore in ejectments, where there hath been no possession for twenty years, either in the lessor, or the plaintiff, or his ancestors, the plaintiff in this action will be nonsuited; unless he can account for it under some of the exceptions allowed by the statute. *Taylor ex dimiss. Atkyns v. Horde*, 1 *Burr.* 119.

3. And twenty years adverse possession is not only a negative bar to the action or remedy of the plaintiff, but takes away his right of possession and gives a positive title to the defendant, for the plaintiff must shew a right of possession as well as of property, and therefore the defendant need not plead the statute of limitations as in other cases. *Ibid.*

4. If no other title appears, a clear undisturbed possession for 20 years is evidence of a fee. *Runn. on Ejectment*, p. 59.

5. By the 9 *G.* 1. c. 16. a time of limitation is extended to the case of the king himself, who is thereby disabled to make title except to liberties and franchises beyond the space of sixty years, to be

reckoned, backward from the time of commencing any suit or proceeding to recover the thing in question. So that now a possession for 60 years will be even a bar to the king's prerogative, in derogation from the ancient maxim of *nullum tempus occurrit regi*.

(I) Pleadings. *Possessionatus fuit.*

16 Vm. 4 c9a

1. THE plaintiff declared in trespass upon his possession, the defendant makes a title, and gives colour to the plaintiff; the plaintiff replies *de injuria sua propria*, and traverses the title set out by the defendant, and upon demurrer, the court held this a good replication, for it lays the defendant's title out of the case, and then it stands upon the plaintiff's *possession*, which is enough against a wrong-doer, and the plaintiff need not reply a title. *Cary v. Holt*, 2 *Stra.* 1238.

2. Where the plaintiff declares upon a possession only, and the defendant pleads *liberum tenementum*, the plaintiff must shew a title in the replication, and must not barely rely on traversing the defendant's title. *Vernon v. Goodrich*, C. B. 1 *Stra.* 5.

3. If the defendant, committing the tort, be owner of the soil, the plaintiff must shew a title; but the declaration is good with the allegation of any title in the plaintiff, if the defendant be a stranger; for possession is sufficient in this case to maintain the action for the plaintiff. *Stroud v. Birt*, 1 *Com. Rep.* 7.

4. A custom, to take a profit in *alieno solo*, is bad; such a right can only be claimed by *prescription*. And per *Asbhurst J.* When a plaintiff in possession brings an action on the case against a wrong-doer, it is sufficient to declare against him upon possession generally, without disclosing any title; but where it becomes necessary to justify under a right in a plea, such right must be set out formally. *Grimstead v. Marlowe*, 4 *Term Rep.* 718.

5. In an action upon the case for the disturbance of rights of common, &c. there is this distinction; where the action is brought against a wrong-doer, it is sufficient for the plaintiff to state in his declaration, that he was possessed of a house or lands, &c. and by reason of his possession thereof, was entitled to the right in the exercise of which he has been disturbed: but where the plaintiff would lay any charge or servitude on the land or property of another, he must set forth his title specially in the declaration. *Vide Waring v. Griffiths*, 1 *Burr.* 440. 1 *Stra.* 5. 4 *Term Rep.* 718. But see 3 *Term Rep.* 768.

6. Case for disturbing the plaintiff in his pew. The declaration stated that the plaintiff had a right to this pew, without laying it to be appurtenant to a messuage in the parish. At the trial of this cause before *Buller J.* the plaintiff did not set up any claim under a faculty from the bishop, or shew any enjoyment in respect of any house, but offered evidence of possession for above 60 years, and would have derived a regular title from one *Chappel*, to whom the minister and churchwardens in the year 1718 gave their consent

sent in writing to build the pew in question. The judge being of opinion that this did not entitle the plaintiff to recover, directed a nonsuit. A motion was made to set aside this nonsuit, but the rule was discharged. The plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration *as appurtenant to a messuage in the parish*. *Per Buller J.* This is an action on the case, and not an action of trespass. Trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession, the possession of the church being in the parson. The word 'possession' must always be understood *secundum subjectam materiam*. Therefore in an action on the case for disturbing the plaintiff in his pew, for which trespass will not lie, the plaintiff must prove a right either by prescription, or by faculty. *Stacks v. Booth, 1 Term Rep. 428.*

7. In declaring for wrongs to *personal* property, the plaintiff must state his right, as in trespass for taking goods, that they were his own goods; or in trover, that he was possessed of them. *Franklyn v. Reeve, 2 Stra. 1023. 1 Ld. Ray. 239. 2 Ib. 890. acc.*

8. In an action for disturbing plaintiff in his pew, the single question was, Whether the plaintiff can maintain this action without proving repairs done to the pew? *Lee C. J.* It is objected for the defendant, that as repairs were laid in the declaration and not proved at the trial, the *posse* ought to be delivered to the defendant; but we are all of opinion, that this being a *possessory* action against a *stranger*, and a mere *wrong-doer*, the plaintiff was not obliged to prove any repairs done by himself or others whose estate he hath: for it is a rule in law *that one in possession need not shew any title or consideration for such possession against a wrong-doer*. But it is otherwise where one claims a pew, or an aisle in a church against the *ordinary*, who undoubtedly has *prima facie* the disposal of all the seats in the church; and against him a title or consideration must be shewn in the declaration and proved, as the building or repairing, &c.; and this is the true distinction. *Kenrick v. Taylor, B. R. 1 Willf. 326.*

9. In an action on the case against a *wrong-doer* for not repairing a private road leading through the defendant's close, it is sufficient to allege that defendant, as *occupier* of the ground, is bound to repair.

10. Every plaintiff in ejectment must shew a right of *possession* as well as of property: and therefore the defendant need not plead the statute, as in the case of other actions. *1 Burr. 119.*

**Poslea.**[ G ]  
16 Vin. 464.

1. **T**HE court will not, at a distance of time after the trial, amend the *poslea* by increasing the damages given by the jury, although all the jurymen join in the affidavit, stating their intention to have been to give the plaintiff such increased damages, and that they conceived what they had given was calculated to give him such a sum. *Jackson v. Williamson*, 2 Term Rep. 281.

2. On a motion for a new trial the *poslea* was brought into court, and after the new trial had been denied the *poslea* could not be found; the court, on debate, ordered a new one to be made out from the record above, and the associate's notes. *Dayrell v. Bridge*, 2 Stra. 1264.

3. When, on the argument of a special verdict in ejectment, the court of Common Pleas gave judgment for the lessor of the plaintiff, the court, on motion stayed the *poslea* until the event of a writ of error (which the defendant intended to bring) should be known, on the defendant's undertaking to account for the mesne profits from the day of the demise. *Roe v. Jones*, 1 H. Black. 34.

4. *William v. Jones and another*, East. 8 G. 2. A verdict in this case was taken by mistake of the associate generally for plaintiff against both defendants, instead of finding defendant *Edward Jones* not guilty; as to the other defendant a verdict was found for the plaintiff, damages 200*l.*; plaintiff moved, that the return of the *poslea*, as to *Jones*, might be amended, which was ordered on the chief justice's report, and hearing counsel on both sides. The return of the *poslea* is the act of the chief justice, and must be made as it ought to be. *Barnes*, 6.

**Powers.**16 Vin. 446.

(For the distribution of Powers, see extract from Butl. note in (A. 16) *infra*.)

*Note*, the three first of the ensuing titles relate wholly to powers of leasing.



16 Vin. 471. (A, 3) Where the Power is pursued. In respect of the *Years* or *Lives* limited (*in the lease.*) [And herein of *Leases in Possession* and *Reversion.*]

1. THE statement given in 16 *Vin.* 474. *pl.* 2. from *Croke*, of the case of *Shecomb v. Hawkins*, differs somewhat from that contained in *Yelvert.* 222. and 1 *Brownl.* 148. both of whom report this case as follows: *L.* levied a fine of lands to the use of herself for life, and after to the use of her eldest son in tail, reserving to herself power to make leases at any time for 21 years, or for three lives, rendering, &c. *L.* leased part of the premises to *B.* for 21 years, and before that lease expired, made another lease to *B.* for 21 years, *to begin after the determination* of the former lease, and died. The first lease expired. A question then arose, Whether this were a good lease under the power? and it was adjudged, that it was not; for, upon such power, *L.* could not make a lease to commence at a day to come, but was confined to a lease in possession, and could not convey *an interest* to commence *in futuro*, or after another estate expired: but the law would adjudge, upon a general power, to make leases, *without saying more*, that they ought to be leases in possession; and the court said, that it had been adjudged accordingly in the case of *The Countess of Suffolk*, stated in 16 *Vin.* 467. *pl.* 6. and *vide note.*

2. It appears, from the report in 1 *Roll.* 12. of the case of *Fox v. Prickwood*, (stated in 19 *Vin.* 140. (E. a) *pl.* 3.) that *Coke* did not, in giving his judgment thereon, insist upon the word *possession*: but *G. Croke* observed, that it was limited, that "he might lease *in possession*," and that *this* extended to lands THEN in *possession*, and not to those then in *reversion*; and then, those of which this lease was made, were lands then in *reversion*. *Coke* however said, that it was intended, that he might at any time lease in possession; for that the word *possession* was to be referred to the lease, and not to the land.

3. *A. B.* was tenant for life under a settlement of *the reversion of lands that were in lease for lives*; with a power, "that it should be lawful for every person who should be actually seised of the freehold of the premises, to make leases of any part thereof, which had been usually letten for lives or years by indenture, for any term not exceeding twenty-one years, or determinable on one, two, or three lives, &c.; so, as there were not, in any part of the premises so leased, at any one time, any more or greater estate or estates than for 21 years, or for three lives, or for any number of years determinable upon three lives." *A. B.* made several leases for 99 years, to commence from the death of a remaining life in a former lease. And the question was, If this lease was pursuant to the power? It was objected, that it was a lease

lease in reversion. But it was answered, and *resolved*, that, when the *reversion* of lands *demised* for life or years is settled to the use of one for life, with a *power* to make leases *generally*, he may make a lease *during the continuance* of a former lease, to *commence* after the former; as *otherwise* his power would be ineffectual. *Earl of Coventry v. Lady Coventry*, Com. 312.

4. Testator devised the lands to his son for life, remainder over; with a proviso, that if his son made any alienation or discontinuance, whereby the premises could not remain, &c. as appointed by the said will, otherwise than by a lease for 21 years, whereupon the old and accustomed rent should be reserved, that *then* such person should forfeit his estate. The son afterwards, in 4 *Marie*, leased to *B.* for 21 years, rendering the ancient rent; and then, 18 *Eliz.* leased unto *R.* and his wife for one-and-twenty years, to *begin presently*, (which was one year before the expiration of the lease made to *B.*) which lease being expired, *R.* entered. And the question was, Whether the last lease, though to begin from the date of it, being made a year before the former expired, was authorised by the power? And it was moved that, although by this authority he could not make leases in reversion, for then he might charge the inheritance in *infinitum*; yet such a lease as this he might make well enough, since it was to begin presently, and so was no charge to him in reversion, for the inheritance was not charged *in the whole* for more than one-and-twenty years, and the court seems to have been of this opinion; for the reporter states nothing as to the event of this case. *Read v. Nash*, 1 *Leon.* 147. And see *Fox v. Collier*, 1 *Anders.* 65. And cited 1 *Leon.* 36.

5. *A. B.* was tenant for life under a settlement in which there was the following power, *viz.* "That it should be lawful for the tenants for life, *respectively*, at all times during their respective lives, and when they should respectively come into and be in *actual possession*, by indentures to demise all or any of the said premises in possession, but not by way of reversion or future interest, for the term of 21 years absolute, or any lesser absolute term, or for any term or number of years determinable upon one, two, or three lives; reserving, &c." Part of the premises subject to the power were let by the agent for tenant for life, by agreement in writing, from 15th *March* 1775, to occupy till 10th *March* 1776, and the rest was, at the time of the lease, in the occupation of tenants at will. Afterwards, on 17th *August* 1775, *A. B.*, by indenture, reciting the power, demised this and other part of the premises to *F.* for 99 years, from *Lady-day* then last past, if she should so long live, at the yearly rent of, &c. At the time of the lease *A. B.* directed the occupiers to pay the rents to *F.*, which they constantly afterwards did. It was contended, amongst other points, in this case, that the lease to *F.* was a lease *in reversion*, and therefore contrary to the power. *A. B.* could not, it was said, at the time of this lease, grant an immediate lease in possession, because part of the premises were let under an agreement for a term, of which several months were then

to run; and, though the rest was stated to have been in the hands of tenants at will, yet, as the law then stood, they must be considered as tenants from year to year; *A. B.* could not have brought ejectment against any of them, and therefore had no *immediate possessory right*; such right, and the right to recover in ejectment being convertible. But it was answered, *First*, That the tenants assented to this lease, and surrendered their possession before the execution of it, in order to make it valid. This was expressly left by the judge to the jury, who found, that *F.* was in possession at the time of the execution. *Secondly*, That, if the jury had not found the lessee to have been in possession, *still this would be good as a concurrent lease*; for this *Read v. Nash* (already stated,) was cited. No authority, it was said, had been cited against this case. *Thirdly*, That, in respect of the power, all the subsisting leases were leases at will; there was no outstanding lease, as against the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately. And, for these reasons, the court unanimously held the lease to be good. *Goodtitle v. Funucan*, Dougl. 565. See *Wilson v. Sewell*, stated in Suppl. tit. *Estate*, (R. a) ante, 8th quest. in *Campbell v. Leach*, Ambl. 743, 4. 6.

6. Lands were conveyed to the use of *T.* for life, remainder to *W.* for life, remainder over; with power for *W.* if he survived *T.* to make leases for 21 years or three lives, *in possession*, and not in reversion. *W.* survived *T.* and then demised the lands, with all the circumstances of formality required by the power, for three lives; *habendum from the date thereof*. And it was held in *B. R.* that the lease was of a freehold to commence *in futuro*, and therefore void. *Denn v. Farnside*, 1 *Wils.* 176. See *Freeman v. West*, stated in Suppl. tit. *Estate*, (Z. a) ante.

7. A lease was granted by the crown to the Countess of *Portland* for 50 years, to commence "*from the day of the date or making*." To impeach this lease an information was some time afterwards filed by the attorney-general on the part of the crown. The principal objection was formed upon the civil-list act, 1 *Anne*, stat. 1. c. 7. which directs, that "all leases, to be granted "of any of the crown-lands should be void, *unless made to commence from the date or making thereof*;" and it was contended, on the part of the crown, that "from the date," and "from the making," *were inclusive*; but, that "from the day of the date," was *exclusive*, and therefore the lease was void for the variance. On the part of the countess, it was contended, that these phrases were both the same. Sir *Thomas Parker* and Mr. Baron *Reynolds* admitted the objection, that it was a void lease, because it commenced *in futuro*. The two other barons were of a different opinion upon this point; but, upon another point, they were also of opinion, that the lease was void. So that, for different reasons, they all held that the lease was not good. *Attorney-General v. Countess of Portland*, Cowp. 723.

8. *B.* devised lands to her nephew for life, with a power, by any writing, &c. to lease the premises for the term of 21 years, or under, or for any term or number of years, determinable upon one, two, or three lives, *in possession*, and not in reversion. The nephew leased *from the day of the date thereof*, for the term of 99 years, if three persons, or any of them, should so long live. This was held to be a lease in reversion. *Doe v. Watton, Cowp.* 189.

9. Tenant for life by marriage settlement, with a power to lease for any term or number of years not exceeding 21 years, *in possession, and not in reversion, remainder, or expectancy*, made a lease by indenture, "to hold," &c. *from the day of the date of the said indenture*, for 21 years. The question was, Whether this was a good lease within the power? Lord *Mansfield*, in delivering the opinion of the court of *B. R.*, first considered the case as a new question, unaffected by any previous decision; in which light the whole turned upon the construction of the particle "*from*." In grammatical strictness, his lordship said, the sense of this word must always depend upon the context and subject-matter, whether it should be taken *inclusive* or *exclusive* of the *terminus a quo*; and more than a hundred instances, he added, occurred to him, in which it was used both ways. Here, it was the intention of the parties, in order to comply with the terms of the power, that it should be taken *inclusively*. He then proceeded to consider the question upon the authorities; and these appeared to him to be contradictory. In the course of this discussion he informed the court, that he had determined the (above stated) case of *Doe v. Watton* upon the authority, in a great degree, of the (above stated) case of *The Attorney-General v. The Countess of Portland*; but Sir *Thomas Parker*, who was of opinion in that case, that the lease was void, had doubts upon the determination, after communicating with his lordship on the subject; and had given him leave to express his approbation of the determination of the case then before the court. And the court unanimously held the lease to be good. *Pugh v. Duke of Leeds, Cowp.* 714. See *Powell on Powers*, 450. *et seq.* and *Re v. The Inhabitants of Gamlingay, 3 Durnf. & East.* 513.

(A. 4) Where the Power is pursued; in respect of <sup>16 Vin. 472.</sup> the Rent [or Covenants,] reserved [or contained.]

1. A Power was reserved in a settlement to successive tenants for 99 years, determinable on their lives, as and when they should be in possession, &c. to lease all or any part of the hereditaments, for any term not exceeding 21 years, or for one, two, or three lives, or for any term of years determinable upon the death of one, two, or three persons in possession; so as upon every such lease of such parts of the premises as had been *anciently* and *accustomably* demised, whereof fines had been usually taken, the old, usual, and *accustomed* yearly rent or rents, or more, should

be yearly reserved during the continuance thereof respectively; and so as, upon every lease of *such part* of the premises, as *had not been usually let*, and for which there *had not been any fine or fines* formerly taken, there should be reserved, during the continuance of the same respectively, the *most and best improved* yearly rent; and so as the lessee or lessees should respectively execute counterparts of the leases. A tenant in possession, not having any rolls or old leases to guide him, as to the reservation of the old rent's (all or most of them being in the remainder-man's hands, who refused to deliver them), made a lease, by indenture, of "all the hereditaments, comprised in the settlement, which had been usually letten, and fines taken for the same; and of all other lands which were within the compass and intent of the said power; to hold for the term of 99 years, if three persons therein named, or any of them should so long live; yielding and paying therefore during the said term, at and upon the days and times in that behalf used and accustomed, the several and respective old accustomed rents reserved and payable for the said several messuages, &c. thereby leased, according to the intent of the said proviso." And he also made another lease, whereby part of the premises, for which fines had not been usually taken, and of which there was then no lease for years, or for any life, in being; to hold for 99 years, if three persons therein named, or any of them should so long live, yielding yearly, during the said term, such sum and sums of money as should amount to the most and best improved yearly rent that could be reasonably had and obtained for the same. The question was, whether the leases were well executed? On the hearing, the latter lease was given up by the lessees, "a reservation of the most improved rents, &c." being so uncertain, that they could not contend in support of it at the bar. And the former, after a hearing before Lord Keeper Cowper, assisted by the Lord Chief Justice Holt, and Lord Chief Justice Trevor, was held, by the Lord Keeper and Trevor, against the opinion of Holt, not to be warranted by the power, and decreed accordingly. From this decree, after a long acquiescence under it, an appeal was brought to the house of lords, where the objections to the lease were, *first*, that it ought to have mentioned the particular rent reserved. *Secondly*, that the ancient and accustomed rent was thereby reserved, as well for lands, not anciently leased, as for those that were; and that therefore it was contrary to the meaning of the power. As to the first objection, it was insisted, that the lease under "the old and accustomed" rent was void, because, there being many farms, and a great estate within this lease, some let at the ancient rents, and some not, it would put insuperable difficulties upon the remainder-man to recover his rent due for the premises comprised in this lease; for, that, in the actions or avowries to be made for the rent, he must be so lucky as to point out what was the old rent, for what, and for how much land it was paid, and at what time payable. And, if a tenant could prove, that a different rent was paid for the land, or that any other land was

was comprised in the lease, or that the rent was formerly paid at any other day, the remainder-man could not recover; but, instead of recovering the rent from the tenant, must, from time to time, pay him costs; that the proviso, directing that the tenant should seal a counterpart of every lease, shewed that the intent of the power was to guard against all inconvenience, by reducing every circumstance attending the execution of it to a certainty. And the appeal was dismissed, and the decree complained of affirmed. *Dutcheys of Hamilton v. Mordaunt*, 3 Bro. Par. Ca. 248. S. C. by the name of *Orby v. Mohun*, Gilb. Eq. Rep. 45. Prec. Ch. 257. 2 Vern. 531. 542. 1 Eq. Ca. Abr. 343-5. 3 Ch. Rep. 56. 2 Freem. 291.

2. A power was reserved by a settlement, to make leases of lands anciently demised, reserving 12s. for every *Chefbire* acre. A lease was made thereupon of all the lands anciently demised, reserving *all the* rent intended to be reserved. And, upon a trial in *B. R.* where the tenant was plaintiff, he recovered, notwithstanding that the reservation was in such general terms; because, in this case, there was an absolute certainty; for the power provided that at least 12s. should be reserved for every *Chefbire* acre, and the lease referred to the words of the power; and, on this ground, the present was distinguished from the above stated case. *Levison v. Pigot*, 3 Ch. Rep. 61—76.

3. Tenant for life, with power to make leases, whereupon the old and accustomed yearly rent should be reserved, built a new house upon the land, and then made a lease for 21 years, reserving only the ancient rent, &c. It was contended, that this could not be said to be the ancient rent, because part of it was issuing out of the new house. But the court held the rent to be well reserved. *Read v. Nash*, 1 Leon, 147.

4. In the case of the *Earl of Cardigan v. Montague* (on a decretal order on the Master's report), where the Duke of *Montague*, being tenant for life, without impeachment of waste, had power to lease, reserving the ancient rent where usually demised, and the best rent where not usually demised, made twenty-four leases. The Master's report, as to many of the leases which he reported bad, was submitted to. As where ancient covenants "to grind at mills," or "to pay land tax," were not in the new lease; and where some part, not within the power, was included in the new lease. And as to five of them, which the Master reported to be good, exceptions were taken. Their validity turned upon this point: The words of the power were "*reserving ancient and accustomed rents, heriots, wons, and serv'ces*." In the former leases, the tenants covenanted "to keep in repair." That covenant was omitted in *these*. And the Lord Chancellor was of opinion, that the covenant in question was a boon, and beneficial to the remainder-man; and he held these leases void for want of it. He said, that he was clear upon the argument; but he took time, because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon

was, "that the estate must come to the remainder-man in as beneficial a manner as the ancient holders held it." *Earl of Cardigan v. Montague*, cited 1 Burr. 122. 1755.

5. In the case of *Goodtitle v. Funucan*, stated in (A. 3) *ante*, 183. one of the objections to the lease arose upon the covenants contained in it; by one of which the lessee covenanted, that she would pay half the land tax, amounting to about 7*l.* 10*s.*; and by another, the lessor covenanted to free her from tithes, and from levies and payments to the church. These covenants, it was said, were not so *beneficial* to the remainder-man, as those in the ancient leases; for that, in the former leases, the tenants covenanted to pay all duties and taxes, except the land tax; that church dues were, by law, particularly chargeable upon the occupier. These new covenants, therefore, were *less beneficial* to the remainder-man than those in the former leases. But the court said, that the objection, as to the covenants, was not much relied on; and did not require much consideration. The power made no mention of covenants. The ground, therefore, must be, that the present covenants were a *fraud* on the power, by lessening the value of the reservation; but, on considering them fully, it appeared that what was thrown on the landlord was compensated by what was paid by the tenant. She was to pay half the land tax. As to the church dues, the covenant seemed to be collateral, and not to go with the land, nor to bind the remainder-man, resembling a covenant for quiet enjoyment. But if it did go with the land, there was no pretence of fraud on the power, the 30*l.* was *bond fide* reserved as an ancient rent. What was stipulated with regard to tithes was of no consequence, since none were payable.

6. Devise of a messuage to *H. E.* with a power to lease in possession for 21 years, reserving the best and most improved yearly rent; and so that (amongst other restrictions) in every such lease there were contained *usual and reasonable* covenants. *H. E.*, pursuant to his power, by indenture, demised the premises for 21 years at an adequate rent, with a covenant from the lessee to keep and deliver up the premises in tenantable repair (accidents by fire or tempest excepted.) The lease also contained a covenant on the part of *H. E.* that *if the premises should be destroyed by tempest or fire during the term, then H. E. or his assigns, or the person or persons for the time being entitled to the freehold and inheritance, his or their heirs or assigns, should repair or rebuild the same, or in default thereof should be at liberty to quit the premises, and forthwith be discharged from payment of the said yearly rent.* The jury found, that this last covenant was an unusual and unheard of covenant on the part of the lessor. It was contended for the lessee, that, although the covenant itself was bad, yet *that* alone might be rejected, and the lease be supported in other respects. But the court of *B. R.* held the whole lease to be void, as not warranted by the power. *Doe v. Sandham*, 1 Durnf. & East, 705.

(A. 5) Where the Power is pursued ; in respect of 16Vin. 473.  
*the Thing leased.*

1. LANDS were conveyed on a marriage to trustees, to the use of one for life, remainder to his first and every other son in tail male, &c. with a proviso, that it should be lawful for tenant for life and the several other persons therein mentioned, as they should be in possession, and for the trustees of the settlement, during any minority, &c. by any deed, &c. to be signed, &c. to demise, lease, &c. either in possession or reversion, for one life, or for two or three lives, &c. all or any part of the said premises, *which had been usually so demised and letten*, so as there should be no more than three lives in being at one time, &c. A lease was after made by indenture, between the trustees (there being a minority) and J. of part of the premises, in consideration of a fine paid, a certain yearly rent, and a specific sum for a heriot. Several old leases of the premises in question were shewn, some in Queen Elizabeth's time, and others in Henry the 8th's time, some for years absolute, and others for 99 years determinable on three lives : and, among the rest, an indenture *tripartite*, bearing date the 15th of December 1638, whereby one of the ancestors of the tenant for life, being seised in fee, in consideration of natural love and fatherly affection to his second son, and for his better advancement, &c. covenanted to stand seised to the use of himself for life, then of his second son, his executors, &c. for 99 years, if his said son, or any woman he should marry, or any issue of his body should so long live, paying unto the heirs and assigns of the father the yearly rent of 4*l.*, with covenants on the part of the son to pay the rent and repairs. The question was, whether a covenant to stand seised could be considered as an evidence of the usual manner of demising ? *Et per curiam*, it shall. There was no doubt but that these lands had been usually leased for lives, and the usual profits made by fines. A covenant to stand seised, entered into by the owner of an estate, they said *was* a lease, and the objection, that the covenant to stand seised in question was by way of provision for a younger child, was of no weight, for nothing was more common than making those leases for the benefit of younger children. *Right v. Thomas*, 3 Burr. 1441.

2. In the case of *Goodtitle v. Funucan*, (stated in (A. 3) *supra*) part of the premises consisted of manors and manerial rights which had never been letten before, and also of a fishery that had been letten before, but was not, at the time of the settlement. Since that time it had been again letten at 15*s.* And the second point in the case was, whether the fishery and manors were demisable under the power. It was contended, the power could not be extended to them. The manors had never been let ; the fishery was not let at the time of the settlement ; and the power required the rent *then* paid, or *more*, to be reserved. Things then,  
for



for which *no* rent was *then* paid, could not be meant to be comprehended. *Sed per curiam*, The power was express to demise the manors and fisheries. "They were *particularly mentioned* in the settlement, and the power went to the whole. They paid under this lease as great a yearly rent as at the time of the settlement, for they paid nothing then; the words therefore were complied with, and this objection can only stand upon the intent." But the court thought no such intent appeared; the manors were of no value; no object of yearly income. The fishery only worth 15*s.* a-year. They were convenient to the lessee living upon the land, and of no use to the remainder-man. The intent they thought was to give leave to demise all, reserving as much rent in the whole as had been paid before. And in fact 3*ol.* more had been reserved.

3. Testator devised all his manors, lands, tenements, and hereditaments to his wife for life, remainder to trustees for *W. G.* for life, remainder to *R. G.* for life, remainder to his sons successively in tail-male, remainder to *M. G.* for life, remainder over; with power for the persons to whom the premises should, by virtue of the limitations aforesaid, come and descend, by any deed, &c. to demise, &c. all or any of the said manors, parts of manors, messuages, lands, tenements, and hereditaments, for one, two, or three lives, or for 99 years determinable on lives, so as the *usual rents* and other yearly payments, dues, &c. were reserved. *R. G.* becoming seised by the deaths of the widow and *W. G.*, demised the tithes mentioned in the next stated indenture for 99 years, determinable on two lives. On his death without issue *M. G.* became seised; and, by indenture, demised in reversion to *P.* a moiety of the *tithes of corn and grain* in *St. N.* (part of the premises) for 99 years, determinable on a single life, *at the rent of 19*s.*, payable quarterly, two capons yearly, and a heriot of 40*s.* on the death of the nominee.* At the time of making the will, part of the estate devised had been usually demised; but *the moiety of the tithes had never been leased prior thereto.* *Lens*, against the lease, contended that the demise of the tithes by *M. G.* was not authorised by the power; since, according to the terms of it, the *usual rent* was to be reserved, which in this case would not be, the tithes never having been letten before. And he cited, amongst other cases, *Baggott v. Oughton* (stated in 16 *Vin.* 472. *pl. 1.* *vide note*) and afterwards, in reply, observed that the first position in the same *pl.* (which see) had never been acted upon, or even noticed, in any subsequent case. And the court of *B. R.* were of opinion, that the intent of the deviser was to include in the power only what was usually letten; and therefore the lease of the tithes was not warranted by it. *Pomeroy v. Partington*, 3 *Durnf. & East*, 665.

{A. 7) Where the Power is *exceeded*. How it 16Vin. 473. shall be.

*Sec. I.* Excess, in respect of the *subject-matter* of the Power.

1. **L**ORD *Conway*, having power by a single instrument to grant leases of his estates, granted several, some of which were not within the power; and though they were all within the same instrument, they were considered as several leases, and it was sent to the Master to separate them. Cited in 2 *Ves.* 645.

2. In the case of *Duff v. Dalzell*, stated in (A. 14) *inf. sec. 2. pl. 5.* where the same power extended over both *real and personal* estate, and was executed by a will to which there was only *two* witnesses; it was held, that this was *sufficient* to pass the *personal* estate, it being a good execution of the power as to *that*, though void as to the real estate.

*Sec. II.* Excess, in respect of the *quality* or *quantity* of the *estate* or *interest* appointed.

1. **L**ORD *Pawlett*, having a power under his marriage settlement of distributing 30,000*l.*, which was settled for his younger children's fortunes, in such shares and proportions as he should think fit, appointed 29,900*l.* to his son *Ann Pawlett*, *subject to the devises in his will*, and directed the other 100*l.* to be equally divided amongst his younger children. Lord *Hardwicke*: "This is void as an appointment; because, where a father has only a power of appointing or distributing portions, which are to be raised in all events, in such shares and proportions as he shall think fit, he cannot annex any condition to the payment of any share which he appoints; and, if such condition annexed is for the father's own benefit, it will then have the appearance of fraud; therefore this court will look upon such appointment to be void; otherwise it is, where the portions are not to be raised at all without the father's appointment; for there the father may annex a condition. Where the appointment to a particular child is evasive and illusory, this court will set it aside, and will not allow such inequalities to be made amongst children as appear to be unconscionable." *Pawlett v. Pawlett*, 1 *Will.* 224. a.

2. If a father, having power to make an appointment to his children, qualifies it by annexing a condition that they shall release a debt owing to them, or pay money over, the appointment will be absolute, and the condition void, the boundaries between the proper execution and the excess being precise and apparent; but, where the boundaries are not distinguishable, such an execution will be had. By Sir *Thomas Clarke*, 2 *Ves.* 644.

3. Trust

3. Trust money being settled, after the decease of the wife if she survived the husband, upon all the children of the marriage, in such shares as the husband should by deed or will appoint; the husband by will, after appointing considerable shares to some of the children, gave two of the daughters small shares only, *on account of what he had before given them in marriage*. Held, these latter appointments were not illusory, for the reason which the appointee assigned. In *Bristow v. Wards*, 2 Ves. jun. 336. See S. P. in *Bogle v. Bishop of Peterborough*, 1 ib. 299. and (A. 16) pl. 2. *infra*.

4. By marriage settlement 4000*l.* was secured, after the death of the husband and wife, for the children of the marriage, save an eldest or only son, in such proportions, &c. as the husband and wife, or the survivor should appoint, and in default equally, at 21 or marriage. There were four younger children, and at different times 1000*l.* a-piece was appointed to three of them. The fourth attained 21, and died, without having any share appointed in the life-time of his father, who survived his mother. Held, the appointments of the 3000*l.* were not illusory, although the representative of the deceased child took only an equal share with the other younger children of the *unappointed* part. In *Wilson v. Pigott*, 2 Ves. jun. 355.

5. By marriage settlement funds were vested in trustees for the separate use of the wife for life; and, after her decease, to pay the principal and all arrears of interest to all and every her child and children in such parts, shares, and proportions as she should by will give, &c. and for want of such gift, &c. to all and every her child and children, part and share alike. The wife, by her will, gave 10 guineas, part of the fund, to her eldest son, declaring he was otherwise provided for; and the remainder to the other children equally, &c. The only provision for the eldest son was a remainder in tail after the death of his father, who survived his wife. Held, at the Rolls, that the appointment was illusory and void, the provision for the eldest son being merely eventual. *Vanderzee v. Aclom*, 4 Ves. jun. 771.

See (A. 14) s. 6. *infra*.

SECT. III. Excess, in respect of the *appointee*; and where relieved in equity.

1. ON the marriage of *A.* with *B.* a leasehold estate was assigned in trust for *A.* for life, remainder for *B.* for life, remainder for the children of the marriage; with power for *A.* to appoint the whole or any part to any one or more *children* of that marriage, if more than one. There were four children of the marriage; and *A.* by deed, in which his wife joined, in consideration of 80*l.* to himself and 50*l.* to his second son, paid by *C.* his eldest son, appointed the estate to trustees, as to one moiety, for himself for life, remainder for *C.* for life; and as to the other, immediately for *C.* for life; remainder, as to the whole, for such wife

as C. should marry for life, remainder to the issue of the body or child or children of C., remainder over. One of the objections to this appointment was, that the father could only appoint to the children *personally*, and not to their wives or issue. But Lord *Hardwicke* held it to be good in the present case, with the consent of C.; for, had it been to C. absolutely, he might directly afterwards have settled it in that manner. That court, he added, never set such appointments aside. *Langston v. Blackmore*, *Ambl.* 289. See S. P. in *Wade v. Paget*, (A. 17) *pl.* 5. *post.* but this question does not appear to have been at all contested there. See however *Brudenell v. Elwes*, 1 *East*, 442. which however was a question at law. See too S. C. 7 *Ves. jun.* 382. but the fact of the children being parties doth not appear there.

2. Testator gave 600*l.* to his wife, to be disposed of amongst his three daughters A., B., and C., in such proportion, and payable in such manner, as she should think fit to give it in her life, either by will, or by any deed or note in writing, &c. The mother, by her will, gave her daughter B. *who was dead*, and to whom she was executrix, 200*l.* as her share of the 600*l.* and died. Lord *Hardwicke* held this appointment to be bad; as the original testator intended this as a *personal* provision for his daughters, and the mother could not have extended it even to the children of any of them, still less to an executor, who might be a stranger to the family; and he decreed the 200*l.* to the two surviving daughters. 1st point in *Maddison v. Andrew*, 1 *Ves.* 57. See *Burleigh v. Pearson*, *Id.* 281. *Falkner v. Butler*, *Ambl.* 514. and *Earl of Bute v. Stewart* (stated in *Suppl. tit. Devises* (l. 6) *ante.*) Lord *Hinchinbroke v. Seymour*, 1 *Bro. Ch. Ca.* 395.

3. Tenant for life, with a power of jointuring, being greatly in debt, married, and by deed before the marriage, made a jointure on his wife to the extent of his power; but a previous agreement was signed between them, whereby she was forthwith to join in levying a fine, the use of which was to pay her only 20*l.* a-year for her own benefit; 50*l.* a-year was to be applied in payment of his debts, and then to his wife for her life; and the residue of the profits were to be paid as he should by will appoint, or otherwise to go to his executors, administrators, or assigns. No fine was levied; and the husband died soon after the marriage. Eleven days after his death the wife conveyed the estate to trustees, to pay herself 20*l.* a-year for life, the overplus of the rents to discharge the said debts, and then in trust for herself for life. Lord *Hardwicke* allowed the appointment as far as it respected the 20*l.* a-year, but beyond that he rejected it, the transaction being a manifest fraud on the remainder-man, and avowed by the wife since the husband's death. *Lane v. Page*, *Ambl.* 233.

4. A. B. devised 6000*l.* to trustees to pay the interest to his wife for life, and gave unto his wife, "the absolute disposal of " the same sum unto and amongst such children begotten between " them, and in such proportion, as she should by last will and " testament, or other deed or deeds to be executed, &c. direct  
" and

“and appoint.” The mother, there being *then* five of the children living, made her will, and therein recited her power, and, in pursuance thereof, gave to her daughter *Anne*, 100*l.* to be paid out of the sum of 5390*l.* which she computed to be the only remaining sum of 6000*l.* after deducting what she had before paid to some of her children. And, as to the remaining produce, she disposed thereof to her daughter *M.* and son *J.* for their own respective use, each one equal fourth part thereof, and also the other remaining two fourth parts; but, as to these last two-fourth parts, upon the trust following, *viz.* as to one of the same, *to place out or continue on securities, during the life of their sister, her daughter C. wife of C., and to pay the interest as she should from time to time direct, &c.*; and at her decease, to pay the principal *to such child or children, if any, as she should have living at her decease, as she should by will appoint, and for want, &c., to such child, if but one, if more equally: in default of such children, the principal of such fourth part, if she survived her husband, to be paid to her, for her only use; but if she died in his life, then to go to the said J. and M., yet for their own respective benefit only; as for one-third part thereof to each of them, and, as to the other third part, and also the other of such remaining two-fourth parts, whereof no such disposition was therein then made, upon trust to pay and apply the principal and interest as they should, in their discretion, think most beneficial for the personal support and maintenance of their brother, her son *F. and his wife and children*, but not for the payment of his debts. It was held, *First*, That the provision to *C. (wife of T. C.)* for life, in the *fourth part*, was *undoubtedly good*, although the provision for the children of *C.* was not a good appointment; because a power to appoint to children would, *in no case*, warrant an appointment to grand-children. Next, as to the contingent interest to *C.*, if she had no children and she survived her husband; but, in default thereof, two-thirds to *J. and M.*, and the other third to go over with the other fourth to *F.*, the court observed, that suppose *C.* left children at the time of her death, it was impossible any of these limitations over should take effect; it would fall into the residue, because it was no appointment, being only a partial appointment of that fourth, given only to *C.* for life; and they were of opinion that the children, though they could not take themselves, would yet prevent the limitation over. But, with respect to the appointment for the benefit of *F.*, and of his wife and children, the court was of opinion, that this was no proper execution as to *F.* because the wife and children were to have something; and, *so far as something was designed for them, it was bad*; and the *excess being unascertainable*, there was no possibility to distinguish precisely *how much* she intended for the mother, and *how much* for the children, so that the appointment could not be supported, unless upon some new ground. It then became a question, Whether the execution of the power might not be made good in some other way? And it was held by Sir Thomas Clarke that it might; for, he said, suppose the mother,*

ther, instead of using the words she had done, had given the share in question to be applied in such way as should be most beneficial for her son, his wife and children, *if they should by law be capable*; he should not have doubted, but that, *as the wife and children were not by law capable*, it would have been *absolute* to F. The question then was, Whether there would be any difference between this case put, and the principal one? It bore an analogy, he said, to what the dispositions of the mother would have been, if she had given it to a son by name, who had never appeared to have had existence, or had never been capable of taking; if it had been given to these four *indefinitely*, and *three were incapable of taking*, the *fourth* would have had *the whole*, and *must* have taken it, as the others were incapable of taking. It fell, *therefore*, within the reason of *Humphries and Taylor*, where a personal estate was given by will to two in joint-tenancy; one was outlawed, and therefore the testatrix made a codicil, whereby she *adeemed* what was given to *one* of the two; and the question was, Whether the other joint-tenant should take the *whole* or only a *moiety*? And the court held, that he was to take *what the other did not*: for they were to take the whole between them. The mother, in the principal case, never designed that *this* fourth part should *fall* into the residue, and it would be extremely hard that it should. *Then F.* would be entitled to the whole of that. But, as to the subsequent restraint, that it should be exempted from his debts, there he held, the mother had exceeded the law, as, in the first instance, she had exceeded her power, by giving to *M.* and *J.* a discretionary authority over *F.*'s share, since a personal confidence cannot be delegated. *Alexander v. Alexander*, 2 Ves. 640. See *Lord Spencer v. Duke of Marlborough*, (A. 12) See 2 Pl. 2. *post*.

5. By indenture, dated 3d Nov. 1758, and fines levied in pursuance thereof, the undivided moiety of certain estates was limited to the use of such person or persons, for such estate or estates, as *A.*, and *B.* his wife, by any deed or writing, to be by them jointly executed in the presence of two witnesses, should *from time to time direct and appoint*; and for want, *&c.* to the use of their first and other sons successively in tail, remainder to the daughters in tail as tenants in common. By deed-poll of 29th Nov. 1758, under the hands and seals of *A.* and *B.*, and attested by two witnesses, reciting the said power, *A.* and *B.* did direct and appoint the said moiety to *A.* for life, remainder to *B.* for life, remainder to trustees to preserve, *&c.* remainder to the children of *A.* by *B.* as they or the survivor should appoint; and, in default of appointment, to all such children living, *&c.* as tenants in common in tail, with cross remainders, remainder to *A.* and *B.* and the survivor and the heirs of such survivor; with a power for *A.* and *B.* jointly, by deed with two witnesses, to *revoke the above uses, and to limit any other uses*, by deed executed in the presence of two witnesses. By indenture of 20th October 1764, between *C.* and *D.* his wife, (who were entitled to the other moiety of the said estates,) of the one part, and *A.* and *B.* of the other part, reciting the first but not  
the

the second of the above-stated deeds, and reciting an agreement dated 24th September 1764, between the said parties for a partition of the said estates, *C. and D.* conveyed their undivided moiety of certain parts (in *C. and W.*) of the said estates, to such uses as *A. and B.* should, by any deed or writing, from time to time release or appoint; and in default, &c. (as was the case) to the use of *A.* for life, remainder to *B.* for life, remainder to trustees to preserve, &c. remainder to the children of *A.* by *B.*, and for such estate and estates as they, by deed or writing, under both their hands and seals, or as the survivor of them, in case of no joint appointment, by any deed or writing, under the hand and seal of such survivor, attested by two witnesses, or as such survivor, by will, should limit and appoint; and if no appointment, to their first and other sons in tail, remainder to their daughters as tenants in tail, remainder to the appointment of *B.*, and for want, &c. to her right heirs. Soon afterwards *A.* died, leaving *B.* his widow, and one son (*F.*) and two daughters (*M.* and *C.*) by her. By indenture dated 4th July 1767, and duly executed by *B.* in the presence of and attested by two witnesses, reciting the deeds of the 3d and the 29th of November 1758, and the 20th October 1764, *B.*, in pursuance of the power reserved to her by the said several deeds, directed and appointed the two moieties of the estates in (*C. and W.*) subject to her own life estate, and the proviso after-mentioned, to the use of her daughters *M.* and *C.* for 500 years, (redeemable by *F.* her son, on payment of 6000*l.*) remainder to *F.* in fee; with a power to revoke that deed, and to limit the same premises between the said children in such manner, &c. as she should think fit. By another indenture, dated 25th October 1771, reciting the said several deeds, *B.*, in pursuance of her said power, granted and appointed the premises, subject to her own life estate, and the proviso after mentioned, as to one moiety, to the use of *M.* her eldest daughter for life, remainder to trustees, &c. remainder to the sons and daughters of *M.* in the usual manner in tail; remainder to *C.* her youngest daughter, and her issue in like manner; remainder to her own right heirs. And, as to the other moiety, to *C.* for life, with limitations over similar to those in the first mentioned moiety. In this deed also a power was reserved to *B.* to revoke, and appoint a-new. Upon this case three points were made; the first of which being irrelevant to the subject of the present section, is stated in (*l.*) *post.* The second point was, that, admitting the first point already referred to, *B.*, under the words of the power, could appoint to children only, and not to grand-children; according to *Alexander v. Alexander* (above stated). This was conceded by the other side, and afterwards resolved by the court; who, however, separated the *excess* from the *due execution*, by holding, that the limitation to the daughters *for life* was good. The question then was, What estate *F.* the son would take? And it was contended; and afterwards resolved by the court, that, the inheritance being unappointed, *F.* took an estate tail, subject to his sisters' life estates under the deed of 20th October 1764; the limitations

limitations of which deed also seemed agreeable to the intention of the parties in the deed of 3d November 1758. *Adams v. Adams*, Cowp. 651. *Goodtitle v. Weale*, 1 *Wils.* 369. b. and *Doe v. Dauny*, (A. 14) *sect.* 5. pl. 2. *post.* S. P.

6. Power to a *feme covert* to dispose by deed or will of 1300*l.* to such of her children, in such manner and form, and to such uses and purposes, as she should appoint. She gave 400*l.* to R. absolutely, 400*l.* to B. at 21. and 500*l.* to P., that is, the interest and dividends to P. for life, and after her decease, the principal to be divided among her children. Under the very full words of this power, the appointment was held to be well made. *Mallison v. Andrews*, *Chanc. Hil.* 1782. 2 *Bro. Ca. Cha.* 27. *note.*

7. Lands were devised to A. for life, remainder to the use of such of his child or children, for such estates, and in such shares and proportions, and subject to such powers, provisions, conditions, &c. as he, by deed or will, should appoint; and for want, &c. to such children, as tenants in common, in tail, with cross remainders, &c. remainder to A. in fee. A. having three sons, B. his eldest son, C., and D., all of whom were living at the time of the devise to him, made his will, and gave one moiety of the lands to C. for life, remainder to trustees to preserve &c. remainder to his first and other sons in tail male, remainder to D. and his issue in like manner, remainder to B. in fee; and he devised the other moiety to D. in the same manner, and with the same limitations over to C. and B. as the former, *mutatis mutandis*. On the death of C. without issue, B. brought ejectment for C.'s moiety, on the ground that the subsequent limitations to the sons were not warranted. The court of B. R., whose opinion was delivered by Lord Mansfield, inclined to think that the appointment might be good to its full extent; and this, *first*, from the subject matter of the power, which was land and a family estate; 2dly, from the limitations over for want of appointment; since they denoted an intention of the donor of the power to make a settlement, although the settlement was such, *i. e.* by entail, as could be barred by the issue at 21; and had this been represented to the donor, she would most probably have adopted, in lieu of this defeasible species of settlement, a disposition in "*strict settlement*." That was meant; but to guard against all events, she said, "I will put the father in my place, and give him authority, if he chuse to execute it." If the words "*in strict settlement*" had been used, nobody could have doubted her meaning. 3dly, continued his lordship, "Now all the words in the language, except those, are used to carry this power as far as possible, and to shew that the meant an appointment in strict settlement. Whatever he might do with his own estate, he might do with this: that was her intention; only that the children were the objects. What is the use of powers? They imply a strict settlement, with power to make jointures, leases, and raise portions." But the court gave no judicial opinion as to this latter point, it being a sufficient answer to



the question then brought on, that, even if those subsequent limitations were void, yet the appointment to *D.* for life in remainder, of the moiety in question, was good. *Cavendish v. Cavendish*, cited in 2 *Durnf. & East*, 245. 4 *Ib.* 741. *et seq.* 2 *Bro. C. C.* 25. note S. C.

8. By settlement before the marriage of *A.* with *B.* his wife, 20,000*l.* was agreed to be laid out in the purchase of lands, to be settled to the use of *A.* for life, remainder to *B.* for life, remainder to the children of the marriage, subject to such powers, limitations, and provisos as *A.*, by deed or will, should appoint; and for default of appointment then, as *B.* should appoint; and in default, &c. to the children (in tail, as appears in 2 *Ves. jun.* 698.), remainder to *A.* in fee. *A.*, being in possession of the trust money, made his will, and thereby gave to the surviving trustee in the settlement 10,000*l.*, part thereof to lay out in real estate, to be conveyed in trust for his daughter *M.* (one of the children of the marriage) for her separate use, remainder to trustees to preserve, &c. remainder to all and every the child and children of *M.* as tenants in common, with remainder over. The appointment of the trust property to the children of *M.* being clearly held an excess, it was contended, that the whole should be considered as unappointed: But Sir *Lloyd Kenyon*, at the Rolls, suggested whether it might not go *cy pres*, and cited *Chapman v. Brown*, 4 *Burr.* 1626. (and stated in *Suppl. tit. Devise*, (C. b) *pl.* 8. *ante.*) And accordingly it was afterwards declared, that, in order to effectuate the general intention of the testator, *M.* should be considered to take an estate tail in the lands to be purchased with the 10,000*l.*, and that she should have the rents to her separate use. *Pitt v. Jackson*, 2 *Bro. Ca. Cha.* 51.

But see the same case on

a bill of review, by the name of *Smith v. Camelford*, 2 *Ves. jun.* 698. where the point of *cy pres* was avoided, by holding (agreeably to the cases in sec. 4. *pl.* 1. *infra*) that whatever was not appointed, or was ill appointed, went as if no appointment had been made; and then the children themselves, in whose favour the doctrine of *cy pres* had been applied, would take as tenants in tail.

9. The following case was referred from Chancery for the opinion of *B. R.* By settlement made on the marriage of *A.* with *B.* his wife, lands in *G.* were conveyed to the use of trustees in trust for *A.* for life, and then to secure a jointure rent charge to *B.*, remainder in trust for such child or children of *A.* by *B.*, and to, for, and upon such estate, estates, trusts, intents, and purposes, and in such proportions as *A.*, by any deed or deeds, or by his last will, to be executed, &c. should appoint; and in default of such appointment, and as and when the uses, &c. to be thereby appointed, should respectively end and determine, in trust for the sons of the marriage successively in tail male. There was issue of the marriage one son *I.* and four daughters. *A.* by his will, devised the lands in *G.* and all other his real estate, charged with his debts and with annuities to two of his daughters, to trustees, to the use of his son *J.* for life, remainder to trustees to preserve, remainder to the sons of *J.* successively in tail, remainder to his daughters as tenants in common in tail, remainder, as to part of the lands

at

at G., to the plaintiff E., one of the four daughters of A. in fee; but with power for J. to make jointures, charge with portions for younger children, and grant leases. Upon A.'s death, J. suffered a recovery of the lands at G., and devised them to the defendant, and died without issue. A question arose upon the effect of the appointment by the will of A. For E. the daughter, it was contended, that the limitation by that will to the trustees to preserve, and to the sons and daughters of J. (who was himself an unborn son at the creation of the power) being against law and void, the estate appointed to E. took effect immediately upon the death of J. And, in opposition to the argument afforded by *Pitt v. Jackson* (pl. 9. *sup.* which was cited), that the will should be construed so as to give an estate tail to J., it was observed, that the latter was the case of an appointment, not of lands, but of money to be laid out in land, where courts of equity allowed greater latitude of construction; nor did the case cited in support of it appear to warrant the decree. But Buller, J. in delivering the opinion of the court, said, that the (before stated) case of *Alexander v. Alexander* was a complete authority against the argument, that if the intermediate limitations in strict settlement to J. and his issue were void, it should accelerate the plaintiff's remainder in fee; since it was there held, that, though the children (of C.) could not take, yet they should prevent the limitation over; and he observed, that the consequence of the doctrine contended for on the part of E. would, in the present case, be, that the son of J., had he left one, would have been disinherited. If then, added he, the remainder to E. could not be accelerated, it became immaterial whether the appointment to the sons of J. were void or not; since, if void, J. took an estate tail under the settlement, if not, he took an estate tail under the will, in order to effectuate the general intent of the testator. But this he did not deliver his opinion upon. And the court certified, that E., the daughter, did not take any estate under the settlement or the will. *Robinson v. Harcastle*, 2 Durnf. & East, 241. 781. 2 Bro. Ca. Cha. 22. 344. S. C.

10. The following case was sent from Chancery for the opinion of B. R. A., after having made his will, devised his estate called V. by two different codicils, to B. his wife for life, with a power to give and devise the same to any one or more of his child or children by her, in such manner, share, and proportion as she should direct and appoint by her will; but so as the said estate should not be divided, but transmitted whole and entire to his heirs. And he then devised the reversion of another estate, adjoining to V., in the same manner; and willed that the two estates should be considered as one estate, and transmitted entire to his family; and, in default of appointment, he devised them to his own right heirs; and died, leaving three sons and two daughters, who were all living when he made the two codicils. B., the widow, by her will, appointed the estate to G. the third son for life, remainder to trustees to preserve, remainder to the sons of G. successively in tail, remainder to his daughters successively in tail, with like remainders to M. the

eldest son, and to the three other children and their respective issue successively. G. survived his mother, but died an infant, leaving M. his heir. The question was, what estates the children respectively took? The judges differed in opinion. Lord Kenyon, Ch. J. and Grise J. certified, that, as the children were the only objects mentioned in the power, they thought it clear that B. could not make any other person a purchaser of any interest in the property; and thus, the execution in favour of the grandchildren, as purchasers, was not warranted. But, although the appointment could not take effect in the particular manner intended by B., yet, her general intention being that the children of her several children should take estates of inheritance in tail general, on the death of their respective parents, they thought that that general intention should be carried into execution, as far as the power given by her husband would allow; and consequently, that G. and his brothers and sisters respectively took estates in tail general. This construction they thought fairly warranted by great authorities. Ashburn, J. and Buller, J. on the other hand, premised their opinion with observing, that the intention of the person creating the power, which, they said, was the material object to be attended to in the execution of it, was to be collected from the words of the will, or other instrument giving the power, according to the ordinary and common, not any legal or technical acceptance. A settlement on a child for life, with remainders to his first and other sons in strict settlement, is in common parlance a settlement on the child; and the general intention of persons, who look forwards to future settlements, is, that the estate shall be tied up as long as the rules of law will allow. Their certificate then proceeded as follows:—"The question is, whether the words 'used in this will sufficiently indicate that intent; and we are of opinion that they do. If the words 'in strict settlement' had been used, the case would have admitted of no doubt. And we think the words 'manner,' 'share,' 'proportion,' and 'transmit' are equivalent to them. The wife having a power of settling the estate among the children, in such manner as she thought fit, it is as extensive as if every manor had been expressly enumerated, or the testator had said 'in strict settlement or otherwise.' Besides, the word 'transmit,' in our judgment, most naturally applies to a strict settlement, and means, that the remote descendants of the testator, as far as the law allows, should take by the gift of the wife, and not by descent. The word 'children' has been held to be co-extensive with issue; and to include grand-children and great-grand-children both in law and equity; as we find in *Wild's case*, 6 Co. *Bendish*, 30. and 1 *Ventr.* 231. We think that the intention of the testator in this case requires that construction, and that the testator used the term 'children' as denoting the branches sprung from him. The expressions, that it was his will and intention that the estate called V., and the other estate adjoining, should be considered as one estate, and be transmitted entire to his family,"

“ family,” confirm our opinion. The case of the *Duke of Devon-*  
 “ *shire* against *Cavendish* (above stated by the name of *Cavendish*  
 “ *v. Cavendish*,) seems to us to be in point: and the language there  
 “ used by the court was, that whatever the person, to whom the  
 “ power was given, might do with the estate if it were his own,  
 “ he might do then, with the exception only that the children  
 “ were the objects. But, supposing that the estate could not,  
 “ under this power, be strictly settled on the issue of the chil-  
 “ dren, yet we are of opinion, that the eldest cannot make a good  
 “ title to the estate. There is, *prima facie*, a contradiction in the  
 “ power, which first enables the wife to give to one or more of  
 “ the children in such proportions as she thought fit, and after-  
 “ wards adds the restriction, that the estate should not be di-  
 “ vided, but transmitted whole and entire to his heirs; for if the  
 “ estate were always to remain entire, it could not be divided  
 “ into different proportions. The only way of making the dif-  
 “ ferent parts of this power consistent (provided the estate cannot  
 “ be limited in strict settlement) is to consider the word ‘ heirs’  
 “ as applicable only to more remote descendants than the chil-  
 “ dren, and to confine the wife’s power of appointment to the  
 “ children during their lives only; in which case, whatever ap-  
 “ pointments the wife might make amongst the children during  
 “ their lives, the estate, after their deaths, would go entire to the  
 “ right heir of the testator. If the testator delegated this power  
 “ to the wife, merely to secure the obedience of the children  
 “ to her, this construction will answer the end. In either way,  
 “ we are of opinion, that G. takes only an estate for life in pos-  
 “ session.” *Griffith v. Harrison, 4 Durnf. & East, 737.*

11. By marriage articles, certain monies were agreed to be  
 vested in trustees for the husband during the joint lives of himself  
 and the wife, and if he should die first, leaving issue by her, for  
 her during her life, and, after her decease, to apply the capital as  
 he should appoint, and in default of appointment, to be divided  
 equally among the issue at 21, with power for the trustees with  
 consent, &c. to lay out the trust money in lands, subject to the  
 same trusts. After the marriage, an estate was purchased with  
 the trust fund, and settled upon the husband, for the joint lives of  
 himself and his wife, remainder to trustees to preserve, &c. re-  
 mainder, in case he died first without issue, to certain uses; but if  
 he died first, leaving any child or children, then to the wife for  
 life, remainder to all the child or children, in such shares (if more  
 than one) as the husband should appoint, and for want of appoint-  
 ment, equally in tail, with cross remainders between them; re-  
 mainder to the right heirs of the husband. The estate was after-  
 wards sold, and the produce invested in bank annuities. The  
 husband by his will appointed part of these annuities to his son  
 for his life, and then to the children of his son as the son should  
 appoint; and made similar dispositions of other parts in favour of  
 his other children and their issue. The appointments to the  
 children being void as exceeding the power, Lord *Loughborough*

held, they could not be remedied by giving the children themselves estates tail, under the doctrine of *cy pres*, as in *Pitt and Jackson*, (pl. 8. *sup.*) even supposing it a clear authority. There the appointment was to *M.* for life, remainder in tail to her children as purchasers; she being entitled under the settlement to a vested estate tail, subject to be defeated by the appointment. There was not therefore the difficulty which was in the principal case in construing that he reduced her interest, that her children might take estates tail by purchase; and that might be executed *cy pres*, by letting the estate tail she had exist, so as to carry over the benefit to her children. Here was a power to the son to appoint to children in such shares as he thought fit. No estate tail was given; but the children would take, either by the appointment, or for want of it, distributively *per capita*. But his Lordship held, that the appointment was void for the excess only; and what was ill appointed went as in default of appointment. *Bristow v. Warde*, 2 *Ves. jun.* 336.

12. Personalty settled on marriage for the husband for life, then for the wife for life, then for all and every the children and grand-children of the marriage, in such shares, under such restrictions, at such times, &c. as they or the survivor should appoint. The surviving parent by deed, on the marriage of one of the daughters, appointed part to trustees for the daughter's husband for life, then for the daughter for life, and afterwards for the children of the marriage. The same parent afterwards, by will, appointed other part for the separate use of another daughter for life, then for *all and every* the child and children of the same daughter equally. She by such will also appointed the residue to a son of the marriage for life, and then for *all and every* his children equally. The appointment on the first daughter's marriage was held good, on the ground of an implied agreement; it being just as if it were appointed to her, and she had settled it so with her husband; though, if it had been done by will, and independent of any modification of the daughter, it would not have held. But the appointments by will to the children of the second daughter, and of the son being general, and not confined to those who should be *in esse* at the appointor's death were held wholly void, even as to those children who might afterwards be born in her lifetime. And the doctrine of *cy pres* was here again held inapplicable to personalty; the court observing that, if the parent appointee were declared entitled absolutely, then his children would not (as in the case of land entailed) succeed in any manner intended by the appointor; but it would go to his executor, and be liable to his debts. *Routledge v. Dorrill*, 2 *Ves. jun.* 357.

*Sec. IV.* Where exceeded. *How it shall be.* [*i. e.* what shall be the Consequences of the Excess.]

1. **W**HERE part of property subject to an appointment is ill appointed, it shall go as the whole would have done in case of no appointment. In *Bristowe v. Warde*, 2 *Ves. jun.* 336. and stated *sec. 3. pl. 11. sup.* So in *Wilson v. Piggott*, 2 *Ves. jun.* 355. and stated *sec. 2. pl. 5. sup.* *Routledge v. Dorril*, 2 *Ves. jun.* 357. and stated *sec. 3. pl. 12. sup.* and *Smith v. Camelford*, *lb.* 698. and stated in *ide note pl. 8. sup.*

2. And where a prior appointment is void as to children unborn at the creation of the power; but a subsequent appointment is within the power, the latter shall not be accelerated by the avoidance of the power, the intent being that it shall not take effect until the prior objects have failed. In *Robinson v. Hardcastle*, 2 *Term Rep.* 241. and stated *sec. 3. pl. 9. sup.* So in *Routledge v. Dorril*, 2 *Ves. jun.* 363. And therefore where the ulterior appointment is to take effect beyond the limits allowed by law, as after an indefinite failure of issue, it is necessarily void. *ut sup.*

3. But where, after a void appointment in the first instance, the ulterior object is within the power, and also to take within a due period, there the latter appointment will have effect at the prescribed time. As where, under a power in a settlement to appoint to children of the appointor, an appointment was, to a son for life, and then in trust for such wife and children or child as he might leave behind him; but if he should die without leaving a wife or a child him surviving, then in trust for a daughter of the appointor. Although the appointment to the children of the son was bad, yet it was held the subsequent gift should take effect, on the happening of the events expressed. There is, (said the court) an alternative; if the son leaves no wife or child at his death, then the limitation over, being to a good object, shall take effect; if he does leave a wife and child, then it cannot take effect. *Crompton v. Barrow*, 4 *Ves. jun.* 681. See *Supl. tit. Devise ante*, (F. c) *sec. 1. n. 2. passim.*

(A. 12) What is a good or void Power to charge  
[or otherwise to dispose of] Lands.

*Sec. I.* With respect to the Instrument by which the Power is raised.

1. **O**N the marriage of *A.* with *B.*, who was then a widow, and seised of an estate in fee, articles were entered into, by which *A.* covenanted, that *B.* should have power, by deed or will, to dispose of her estate, after her decease, to any person whatsoever;

soever; and that he would do any act to confirm the same. After marriage, the wife, by lease and release, reciting the articles, conveyed her estate to trustees, after her death, to the use of her natural son for life, with remainders over. Afterwards the husband and wife levied a fine of the premises, and declared uses thereof different from those of the release. Lord *Northington* held, that the wife having the legal interest in her, the lease and release were not good to pass her estate, either as a conveyance or as an execution of a power; and that the estate passed by the fine. *Bramball v. Hall*, *Ambl.* 467.

2. Previously to the marriage of *A. B.* with *C. D.* his wife, who was entitled by descent to the inheritance in fee in remainder of the moiety of a *trust estate*, articles were entered into between *A. B.* of the first part, *C. D.* of the second part, and trustees of the third part, whereby it was agreed, that certain estates, which *C. D.* was then entitled to in possession, and all such estates either real or personal, which should or might *descend upon or come to her* during her coverture, or to her husband in her right, should be to her separate use, and to be disposed of as she should by deed or will, &c. appoint. And *A. B.*, the husband, covenanted to do all proper acts for vesting such estates in *C. D.*'s appointees accordingly. The moiety of the trust estate afterwards fell into possession, and then *C. D.* made her will, and thereby, after noticing the articles, devised her said moiety to her husband for life, remainder (subject to a 500 years term,) to her children by him and their issue, in the usual course of settlement. It was objected, that the power was not well raised by the articles, and that *C. D.* could only have done it by *new-modelling her interest*. But Lord Ch. *Northington* said, that she must have effected this by way of grant, the legal estate being in trustees; and that such a grant would only have operated by way of declaration of trust, which he thought the articles themselves amounted to. Many instances, his lordship observed, occurred where the court would not assist a defective instrument, against the heir, unless there was a meritorious conveyance. In the (above stated) case of *Bramball v. Hall* he was of opinion, there was no meritorious conveyance. Here the provision was for children, and meritorious. And he held, that the articles were a good reservation of the estate, and that the will was a good appointment of it. *Wright v. Englefield*, *Ambl.* 468. And this decree was afterwards affirmed in the House of Lords. *Wright v. Cadogan*, 6 *Bro. Parl. Ca.* 156. S. C.

3. Previously to the marriage of *A. B.* with *C. D.* his wife, who was seised of a freehold estate, a bond was entered into by the former, with a condition, empowering *C. D.* to dispose of her freehold estate, by deed or will, notwithstanding her coverture. No settlement appeared to have been made on the occasion, nor any other transaction to have passed but the bond. The wife, afterwards, by her will, gave her estate to her younger children in fee. On a question, Whether the power was well reserved? a distinction was taken between the present and the last stated case:

There,

There, it was said, the *legal* estate was in trustees; but in this, it remained in the wife; and it was argued that, whatever might have been the case, if the wife had made a disposition for a valuable consideration, yet, this being a question between volunteers, the court would not interfere. But Lord Camden said, it was a mistake to call it a question between *volunteers*; the agreement was on marriage; and the wife might have compelled the husband to join her in a fine. And though the two cases differed, in respect that the wife had only the *equitable* interest in the one, and the *legal* interest in the other, yet the principle of the determination was the same in both; and he decreed a conveyance to the younger children. *Rippon v. Douding, Ambl. 565.*

4. Previously to the marriage of *A.* with *B.* his wife, who was entitled to a reversionary estate in fee, *B.* signed a paper writing, *without seal or stamp*, which stated, that it was agreed that *B.*'s fortune should be settled or remain to their joint use for her life, or the life of the longest liver; and if, (in the event, which happened,) *B.* should die first, *then the aforesaid fortune to be at her own disposal*; and it was agreed, that proper settlement deeds to this effect should be prepared, as soon as it could conveniently be done. A duplicate of this paper, *without seal or stamp*, was signed by *A.* On the same day and year *B.* made her will, and after certain specific devises, gave the residue of her estate and effects to *A.* The marriage took effect, and *B.* died in the lifetime of *A.* The court of *B. R.* would not permit a title of so doubtful equity as they thought that of a claimant under *B.*'s will was, to be set up in defence to an ejectment brought by her heir at law; since there was no colour for saying the articles gave any legal title. In *Doe v. Staples, 2 Durnf. & East, 684.*

## SECT. II. With respect to the *AEs* authorised by the Power.

1. **T**ESTATOR devised lands to his sister and her heirs; but willed, that she should in six months after his death, by some writing or good assurance, settle her estate on his brother for life, and on her sister *E.* for her widowhood, if she survived her husband, and after their decease, on any other person or persons *for their several lives*, who were or should be descended from the testator's mother, as her said sister should think fit and appoint; and that she might, at any time during her life, make void any appointment, and nominate any new person to receive such profit out of her estate, provided it were to the descendants of his mother, *because it was his desire, that his estates should continue to persons always descended from his mother*; and for that purpose, he advised, that a writing might be made to trustees for 99 years, to the uses aforesaid. The sister, after the testator's death, appointed, but with power of revocation, which she afterwards exercised. She then limited the lands to trustees, to permit *A. B.* a descendant of the mother, to receive the rents during his life, remainder to his sons successively in tail male; and in the same manner to other



other descendants of the mother ; remainder to the right heirs of the brother. The general question was, Whether the sister had power, by the will, to dispose of the inheritance ; and if she had, whether it was properly exercised ? Lord *Hardwicke* thought, that the testator intended a succession of freeholds to descendants of the mother ; but, in order to effectuate this, the sister must have a power of limiting the inheritance ; and he cited *Humberstone v. Humberstone*, stated in 16 *Vin.* 333. and reported in 1 *P. Wms.* 333. He was therefore of opinion, that the testator intended estates for life to all the descendants *in esse* at his death ; (but to these his lordship could not add those who come *in esse* afterwards ; ) then the remainder to the *heirs of the body* of the testator's mother, remainder or reversion in fee to the right heirs of the testator, (not of the mother.) *Godolphin v. Godolphin*, 1 *Ves.* 21.

2. Estates were devised to trustees, to the use of several persons successively for life, remainder to trustees to preserve, &c. remainder to their respective first and other sons successively in *tail male* ; but, with power for the trustees, on the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in *tail male*, and to limit the estates to such sons *for their respective lives*, with immediate remainders to the *respective sons* of such sons in *tail male*. Lord *Hardwicke* was of opinion, that this clause of revocation and re-settlement was against law and void, as tending to a perpetuity, and repugnant to the estate limited. And this decree, upon appeal to the House of Lords, after the judges had delivered their unanimous opinion against the legality of the clause, was confirmed. *Lord Spencer v. Duke of Marlborough*, 5 *Bro. Par. Ca.* 592. *Hucks v. Hucks*, 2 *Ves.* 568. S. P.

#### (A. 14) Where it is well executed ; as to the Manner.

##### SECT. I. With respect to the Nature of the Instrument.

1. ONE made a feoffment, with power of revocation by *writing*, sealed and delivered, in the presence of three witnesses, and that he might limit new uses upon the revocation, and that the feoffees should be seised to such uses. Afterwards he devised these lands by his will, sealed, and published in the presence of three witnesses. This was held to be a good revocation. *Hubbard's case*, *Hil.* 17 *Jac.* cited *Lit. Rep.* 218.

2. *E.* a feme covert and *F.* her husband, by deed and fine, conveyed several estates, the property of *E.*, in *C.*, *L.*, and *M.*, to the following uses ; *viz.* as to the estates in *C.* and *L.*, except as therein mentioned, and certain parts of the estates in *M.*, to the use of *F.* for life, remainder to *E.* and her issue in strict settlement ; and as to the residue of the estates in *M.*, and all other the estates of which no use was before limited, to the use of trustees, upon trust, by sale or mortgage, to raise such sum of money

money as *F.* and *E.*, or the survivor of them, should, by any writing under their hands and seals, or under the hand and seal of the survivor of them, attested by two or more credible witnesses, direct or appoint; and then, to convey to *F.* for life, and, after his decease, to such person or persons, and for such estate and estates, &c. as *E.* should, by any writing under her hand and seal, &c. direct, limit, or appoint; and, for want, &c. to herself in fee. And in the deed was contained a proviso, that, if there should be no issue by *F.* on the body of *E.*, or, being such, all of them should die in the lifetime of *E.*, then it should be lawful for *E.* by any writing under her hand and seal, attested by two or more credible witnesses, (notwithstanding her coverture, &c.) to revoke, alter, change, or make void all or any the use or uses, &c. therein contained, except the estate for life limited to *F.*, and except such estates as should be sold or mortgaged for raising money, as aforesaid; and, “*by the same,*” or “*any other deed,*” to grant, limit, and appoint the same premises, to any person or persons, for such use and uses, &c. as she should think fit, direct, or appoint. Afterwards *E.* not having any children living, made her will in writing, under her hand and seal, in the presence of three witnesses, and thereby, without taking notice of the settlement of 1726, she devised all her estates which descended to her, and in which she or her husband, in her right, or any other person in trust for her, then had any estate, subject as therein mentioned, to her husband and his heirs. A question arose, whether *E.* had properly executed the power of revocation by her will? In support of the affirmative it was argued, that the will was a writing under the hand and seal of the appointor, attested by three witnesses, and substantially as well as literally answered the description, and comprised all the requisites of the power. That, to give a contrary interpretation to the power, by reason of the latter words, “*by the same or any other deed,*” would be to contradict the former part of it, which enabled *E.* to revoke the use by any writing; and it was accordingly decreed, that the power was well executed. *Roscommon v. Foulkes*, 4 Bro. Parl. Ca. 523. A question was raised as to the validity of an appointment under a power, given to a husband and wife and the survivor, over a reversionary interest, after their death, to be executed by any writing under hand and seal in the presence of two witnesses. The wife, after the husband's death, married again, and, during coverture, appointed by will under hand, &c. It was objected, that a writing, in form of a will, was a defective instrument here; for it was not intended to be executed by will, but by some instrument to take effect in the lifetime of the party, because to be executed jointly: and then, when it was to be executed by the survivor, it ought to be done by the same kind of instrument. *Sed per Lord Chancellor*—“There are several cases, where, when a power was reserved to be executed as here, a will, pursuing the requisites of the power, has been held a writing within that power; nor could it be intended, in this case, that the instrument should take effect in the life of the parties, it

"it being over the reversionary interest. Suppose by an instrument not in the form of a will, she had appointed expressly after her death; it would have been good. Then it was no objection, that she had done it by an instrument, which spake, that it was to take effect after her death; and the gift appeared to be the subject of the power." *Burnett v. Man*, 1 Ves. 157.

3. Lands were limited by *A.* and *B.* (father and son) to the use of *A.* for life, remainder, subject to a jointure rent-charge, to the use of such person or persons, and for such estate and estates, &c. as *A.* and *B.* by any of their "deed or deeds," (either with or without power of revocation,) to be by both of them sealed and delivered in the presence of two or more credible witnesses, should from time to time jointly grant, direct, limit, or appoint. And, in case of the death of either of them, then as the survivor of them by any "deed or deeds," to be executed as aforesaid, should from time to time alone grant, direct, limit, or appoint; and in default of such appointment, to the uses therein mentioned. *B.* died in the lifetime of *A.*, who afterwards, by his will, gave part of the premises to his brother in strict settlement. It was held in *B. R.* that the power was not duly executed by the will; Lord Mansfield, in delivering the opinion of the court, observing, that there were no words to lay hold of, upon the construction of which it might be supported; for the first requisite which the power imposed was not possible to be performed by will; which was, that it should be by joint deed of *A.* and *B.* Now there could not be a joint will. It was true, he said, the survivor had the same power; but then it was "emphatically" reserved to be executed by "deed." Now the word deed had a technical signification, to which a will was in no respect applicable. If any words had been thrown in, such as writing, instrument, or other term of a general comprehensive meaning, it might have been fair to have taken advantage of it, in favour of the intention. But here were no such general words; and the intention of the person who created the power could not properly be fulfilled, unless the form was strictly pursued. *Earl of Darlington v. Pulteney*, *Corup.* 260. See *Branhall v. Hall*, stated in (A. 12.) *supra* 1. pl. 1.

And, when a power of appointment of personal

property is executed by will, such will must be regularly proved; as, where a feme covert, having a power to appoint personal estate by will, left a testamentary paper, which, it was contended, was an execution. This paper was not proved in the ecclesiastical court; but this, it was argued, was unnecessary, since it was only the writing of a feme covert executing a power, and not strictly a will, her husband not consenting to it. Lord Hardwicke, however, was of opinion, that though in notion of law a wife could not make a will, yet, when she had a separate power over her estate, and might dispose of it by will, whatever sort of writing she left ought to be first proved in the spiritual court, which will not give probate of the will; but administration with the will, as a testamentary paper, annexed. *Rose v. Ewer*, 3 Atk. 156. *Stone v. Forryth*, Dougl. 307. *Colhay v. Sydenham*, 2 Bro. Ca. Cha. 319. S. P. And an instrument made in execution of a power, either coupled with an interest, or a mere naked authority, retains all its usual properties; so that, if an appointment be made in execution of such power, by will (of the essence of which species of conveyance it is, to be ambulatory and incomplete till the death of the testator) and the appointee die before the appointor, the appointment will not take effect; but the property will lapse as undisposed of: and this was determined in the cases of *Oke v. Heath*, and *Duke of Marlborough v. Lord Godolphin*, both stated in *Supp. tit. Devise* (Y. c) ante. See also *Lawrence v. Wallis*, 1b. (R. 6)

§2. II. With respect to the *Formalities in the Execution of the Instrument.*

1. **L**ANDS were conveyed to certain uses, with a power for the settlor to revoke those uses, by any deed or writing, to be executed in the presence of *six* or more credible witnesses, three whereof were to be peers of the realm. The settlor afterwards made another will, attested by *three* witnesses, none of whom were peers, whereby he revoked this settlement, and thereby gave a great part of his estate to *M.* On behalf of *M.* it was insisted, that, although this might not be a revocation in strictness of law, by reason the circumstances were not pursued, either in the *number* or *quality* of the witnesses, yet, as this will was made with great deliberation, (it being in proof, that the draft was not completed until six months after instructions given for it, and that Lord Ch. J. *Pollexfen's* opinion was taken upon it,) this will ought to be an effectual revocation in equity, for, the circumstances prescribed were *only* to prevent surprise, and it was evident that there was none in this case. But it was held, that the will was no revocation of the settlement, either in law or equity; for, in all cases of settlements and revocations, *merely voluntary*, every circumstance ought to be pursued. *Duchess of Albemarle v. Earl of Bath*, 2 *Freem.* 193. 3 *Ca. Ch.* 55. See *S. C.* stated in 16 *Vin.* 497. *pl.* 4. and *vide* note. *Attorney-General v. Thrupton*, stated in 8 *Vin.* 479. *pl.* 17. 2d point in *Sargefon v. Sealy*, stated in (A. 17) *post.* and *Godwin v. Kilsha*, *Amb.* 684. *S. P.*

2. *T.* made a settlement of lands to the use of himself for life, and afterwards to such child or children, and for such estate, or estates, as he should by any writing under his hand and seal, testified by *two* credible witnesses, limit and appoint. He, afterwards, made a will, which was executed in the presence of *two* witnesses *only*. And the question was, Whether this, being void by the statute of frauds as a will, should nevertheless be good as a declaration of trust, and an execution of the power? And it was decreed to be a good execution of the power; for, though it was not effectual in all points, (as it was intended,) *as a will*, yet it was a *writing*, which had all the circumstances required by the power. *Denn v. Thwaites*, cited 3 *Ch. Ca.* 69. 2 *Vern.* 80. *S. C.* but on another point.

3. A sum of money to which *A.* was entitled, was vested, previous to her marriage, in trustees, upon certain trusts; and, in case of no children living at the death of *A.*, she dying in the lifetime of her husband, then to be for such uses, &c. as *A.* should, by her *last will and testament* in writing, or other writing under her *hand and seal*, to be attested by *two* or more credible witnesses, notwithstanding her intended coverture, limit, &c. Afterwards *A.* died, living her husband; and, on the day she died, a paper in her hand-writing was found in her closet, but not signed by her, nor attested by witnesses, the tenor of which was as follows, *viz.* " I  
" declare

"declare this my will. To sister *Elizabeth Taylor* 100*l.* To sister *Sarah Rofs* 100*l.* To my son *Alexander Rofs* 400*l.*" And containing in like manner legacies to several other persons to the amount of 1240*l.* The question was, Whether this memorandum was a sufficient appointment within the power? And this question Lord *Hardwicke* resolved into another, Whether this being taken as a will or paper-writing, the solemnity of sealing and attesting were necessary to both? He was of opinion, that the latter words in the clause, *under her hand and seal, &c.* were referable as well to the will as to the other writing. That, "then" in trust to transfer the moiety unto such person, &c. as the said *Ann* should in and by her last will and testament in writing, or other writing under her hand and seal to be attested, &c. limit, appoint, and declare," &c. was one entire sentence; and, being so, the words were naturally referable to both. Therefore the observations which had been made on the word "or" being a disjunctive, were not material in this case. The meaning of framing it in this manner was, to give *A.* a greater latitude than the words *will in writing* only would have done. And his lordship thought the case of *Dormer v. Thurland*, (stated in 16 *Vin.* 484. pl. 19.) much stronger than the present one. And he held, that the power was not well executed. *Rofs v. Ewer*, 3 *Atk.* 156.

4. On the marriage of *C.*, an estate was settled upon himself for life, with remainders over in the common form. Articles were entered into, when *J.* the eldest son, and *T.* the younger son of *C.* came of age, reciting the settlement, and that, whereas there was thereby no provision for younger children, though several were then living; to the intent therefore that 300*l.* might be raised, *C.* the father, *J.* and *T.* had taken it into consideration, and agreed, that 300*l.* should be raised upon the estates, immediately after the death of *C.*, and to be paid to such younger children in such manner and form as he should, by his last will duly executed, direct and appoint; and in order to have the same effectually done and assured, the two sons did covenant, that, after the father's death, any part might be granted, mortgaged, &c. for raising the 300*l.* to be paid as the last will and testament of *C.* should direct and appoint. The father, by will, attested only by two witnesses, particularly distributed this 300*l.* It was contended, that this provision could not take effect, as there was not a proper execution of the power; the will not being such as would pass lands according to the statute of frauds, all the requisites of which, it was argued, were called for by these articles; for, the addition of the word "duly" was tantamount to "legally:" and *Wagstaff v. Wagstaff*, (stated in 8 *Vin.* 129. pl. 5.) and *Langford v. Byre*, (stated in 16 *Vin.* 479. pl. 11. side note,) were cited. But it was observed by the court, that this was the disposition of the sons, and not of the father, who was only referred to as a proper person to apportion the sums, and passed no interest in the lands from himself. He therefore stood in the same situation as a mere stranger; and, if one should charge

charge his estate with a sum, to be divided as a mere stranger should think proper by will, the necessity of its being a will conformable to the statute did not occur. And the court was of opinion, that the power was well executed. *Jones v. Clough*, 2 Ves. 365.

5. *D.*, by will, had given several shares in the *Sun Fire Office* to *F.* his daughter, and after his decease, to such persons as she, by her will, should direct; and he had also devised real and personal estates in *Jamaica*, in moieties, the one moiety to *F.* for life, and, after her decease, to such person as she by will should direct; the other moiety to *R.* in like manner. *F.*, by her will, reciting that of her father, disposed of the *Sun Fire* shares, and also of the real estate; but the will was not executed to pass real estate, there being two witnesses only to it. It was contended, that, where the power was to be executed by will, it must be such an one as would pass the property that was the subject thereof; and therefore, as land as well as personalty was the subject on which this power was to attach, the testator, meaning to give a power over both, must have intended that the instrument should be such as would dispose of the real estate as well as the personal. *Sed per curiam*—The will, being sufficient to pass the personal estate, was, so far, a good execution of the power. *Duff v. Dalzell*, 1 Bro. Ca. Cha. 147.

6. By marriage settlement, 300*l.* *New South Sea* annuities was agreed to be transferred to trustees, for such uses as *A. B.* (a married woman,) by any writing or writings under her hand and seal, attested by two or more credible witnesses; or by her last will and testament, to be by her signed, sealed, and published in the presence of the like number of witnesses, should appoint. *A. B.* made two testamentary papers, the one of them beginning: "This I desire may be done as my last will and testament." Wherein, amongst other things, she said, "I be will to my husband the sum of 300*l.*, my new joint stock annuities for his own use." This was written on unstamped paper, and was only signed by the testatrix. She afterwards, on the same day, made the following testamentary writing upon stamped paper: "This is my last will and testament, at my death, for my husband to be will to him the sum of 300*l.*, which is now in the joint stock annuities, for his own use." The testatrix, having fixed the two papers together with a wafer, requested two witnesses to attest the same, which they did; and she declared the same to be her will, and delivered it to one, who kept the same till her death. The Master of the Rolls thought the stamp equivalent to a seal, without having recourse to the wafer which annexed the stamped paper to the other; and he therefore held it an instrument executed according to the power. First point in *Sprange v. Barnard*, 2 Bro. Ca. Cha. 585.

7. A power to revoke the old and declare new uses, with the consent in writing of trustees, was held ill executed, where the appointor signed the consent in the name of one of the trustees, under a general

general power to consent to any deed he chose to make. *Hawkins v. Kemp*, 3 *East*, 410.

8. And the power being to revoke and appoint a-new, by deed *inrolled*, another deed of revocation, properly executed and assented to, but not inrolled till after the appointor's death, was on this account held bad; it being held that every act required to be done in the execution of a power, must be completed in the lifetime of the person executing it. *Id.*

*Sec. III.* In regard to adhering to the *particular Acts* authorized.

1. **I**N replevin, the defendant avowed upon a settlement; with a power to R., by deed or last will, to give or devise 200*l.* to any younger child unmarried, or what on marriage, should be agreed to be paid, or an annuity out of the twenty acres in question, to continue *so long* after the devisor's death as the daughters' portion, or *what* should be agreed on marriage, or any part thereof, should be *unpaid*, until they received 200*l.* a-piece. Afterwards R. agreed to pay the defendant 150*l.* marriage portion, and an annuity was granted until 150*l.* should be raised. The defendant avowed for a year's arrear. It was contended, on this point of the case, that, this was not good, any more than limiting an estate for *two* lives would be in a power to lease for *three* lives; but it was answered, that *the grant was* in the words of the power; to which the court agreed, and *Jones and Twissden* said, it had been held, on the statute of leases, on the words, "otherwise than for *three* lives or twenty-one years," that a lease for a less period was good. And the principal case was adjudged for the defendant. *Briers v. Bolton*, 3 *Keb.* 692. 20. 745. 15.

2. Upon a marriage settlement, a power was given to every tenant for life, when in possession, to limit hereditaments to any woman he should marry, *for her life*, by way of jointure and in bar of dower. The tenant for life made a lease for 99 years, *determinable* on the death of his wife; and it was held, on a special verdict on ejectment in *B. R.* that, however she might be entitled to relief in a court of equity, yet, *at law*, it could never be said to be an execution of the power; for the *estates* were very different, the one being a *freehold*, and the other a *chattel*, and the freehold in her being a qualification in any after-taken husband to be a member of parliament, kill game, &c. But Lord *Talbot* held the lease to be warranted by the power, saying, that it was not a *defective* but a *blundering* execution; and he decreed the defendant to pay all the costs both in law and in equity. *Rattle v. Popham*, 2 *Sira.* 992. See 2 *Burr.* 1147. 2 *Ves.* 644.

3. A power in a marriage settlement of an undivided third part of an estate to *make sale of, or convey in exchange*, for or in lieu of other manors, lands and hereditaments, the said undivided third part of all or any of the said manors, &c. for the best price in money or such other equivalent interest in manors, lands, and hereditaments as to the trustees should seem proper. This power was

was held to authorise a partition, the effect of which was precisely the same as an exchange as to the interests of the parties. *Abel v. Heathcote*, 2 *Ves. jun.* 98. 4 *Bro. Ca. Cha.* 278. S. C.

4. A power in marriage articles to charge an estate agreed to be limited, after the parents' deaths, to the first and other sons, &c. with such sums for the benefit of younger children as the father should appoint, was held well executed by his directing a sale. *Long v. Long*, 5 *Ves. jun.* 445.

5. A power in a settlement to appoint lands to children was held well executed in equity by a devise to trustees to sell, and an appointment of the purchase money to the children. *Kenworthy v. Bate*, 6. *Ib.* 793.

*SECT. IV.* With respect to the *Indication of an Intent to execute the Power.*

1. *C.* Devised the income and produce of 1000*l.* *South-Sea* stock to *F.* for life, and gave him a power to dispose of 400*l.*, and in default, &c. he gave the same to a charity. *F.* made his will, and thereby gave several legacies, and then devised the *rest* and *residue* of his personal estate amongst his nearest relations. The question was, Whether this 400*l.* passed by that devise of the *residue*, and whether that was a *good execution* of the power? *Parol* evidence was offered to prove, that it was the intent of *F.* that the 400*l.* should be disposed of by his will; but it was not allowed by the Master of the Rolls, who held, that this was *not* an execution of the power; but that the 400*l.* must go over according to the will of the first testator. *Moulton v. Hutchinson*, 1 *Atk.* 559. 2 *Eq. Ca. Abr.* 659. note *a.* S. C.

2. *C.* surrendered a copyhold estate to *B.* and another to the use of the wife of *C.* for life, and, after his death, to pay the rents and profits to all her children equally, and *then* in trust to such use or uses as *C.* should by deed or will appoint; and for want, &c. to his son *J. C.* and his heirs. The wife died; and then *C.* made his will, in which there was the following clause: "As to all the rest, residue, and remainder of my effects, real and personal, of what nature, kind, or quality soever, I give to my son *G. C.* in full bar and satisfaction of what he may claim by virtue of the custom of *London*, or otherwise." The question was, Whether *C.* had, *by his will*, made a *proper appointment* to *G. C.* of the copyhold estate? Lord *C. Hardwicke* observed, that, though a man might execute a power without reciting it, or taking the least notice of the power; yet it was necessary he should mention the estate which he disposed of, and he must do such an act, as shewed that he took notice of the thing which he had a power to dispose of. *C.* had *other lands* on which the devise to *G. C.* might be satisfied. Here was nothing that was at all descriptive of the thing which *C.* had a power to dispose of, but what was *applicable* to other estates of which he was seised, and of which he could equally dispose; and his lordship was of opinion, that the



power was not executed. *Ex parte Caswall*, 1 Atk. 559. *Rx v. Read*, 8 Term Rep. 118. S. P.

3. One, by his marriage settlement, had a power to charge an estate with 2000*l.* after the death of his wife, and a term of years was raised for that purpose. The husband made a will in these words; "*First, I charge all my real estate,*" &c. and it was held by Lord Hardwicke, that, if a man had a power to charge an estate, it was not necessary in the execution of it that he should refer to the deed out of which the power arose; for, in a court of equity, it was enough that his intent appeared; and if, in the execution, he sufficiently described the estates he had a power to charge, (and here he had charged all,) the estate would be certainly bound; *especially where the person charging was a purchaser of the power*. And his lordship held, that the power was well executed. *Probert v. Morgan and Clifford*, 1 Atk. 441.

4. Tenant for life of a trust estate, with a power to settle a jointure on any woman that he should marry, not exceeding 500*l.* a-year, by deed, in consideration of his marriage, and of a marriage portion of 3000*l.*, reciting his power, and *that he was minded to execute it in the fullest extent*, limited to his wife for her jointure several farms of the yearly value of 499*l.* 14*s.*, according to the rents they were then let at. Soon afterwards he made his will; and finding that the lands, when the leases expired, would sink in their value about 70*l.* a-year, (which they accordingly afterwards did,) he by a codicil thereto *desired and earnestly requested* his son, inasmuch as the lands he had settled upon his mother were greatly fallen in value, to make up her jointure 500*l.* a-year. Sir J. Fekyl, at the Rolls, was of opinion, that the will, as auxiliary to the settlement, might be considered as completing that which, though the obvious intention of the parties, was, on account of their taking the false criterion of the rental to ascertain the value, before imperfect; and he held, that the words *desire and request* were sufficient for this purpose. *Vernon v. Vernon*, Amb. 1.

5. On the marriage of *A.* with *B.* his wife, a sum of 3000*l.* 3 per cents, the property of *B.*, was vested in trustees, amongst other purposes, after the death of the survivor of *A.* and *B.*, and upon the event which happened, of there being no children of the marriage, to transfer the stock as *A.* should by deed or will appoint. *A.* made his will, and gave several pecuniary and specific legacies. "*and all the rest and residue of his monies, and securities for money, goods, chattels, and personal estate whatsoever, and of what nature or kind soever, after the death of his wife, he gave*" to the defendant. The testator's property was insufficient to pay the legacies by about 600*l.* The question was, Whether the 3000*l.* passed by this residuary bequest? The Master of the Rolls stated the following rule from 12 Mod. 459. "When one has an authority, and does an act which can be good no other way, but by virtue of that authority, it shall be understood to have been done by virtue of it; but when one has an interest, and an authority together, and does an act generally, it shall be construed in relation  
" *then*

"tion to his interest, and not to his authority." Applying this doctrine to the case before him, his Honor was of opinion, that the will was not an execution of the power. And this decree was, upon an appeal to the Lord Chancellor, confirmed. *Andrews v. Emmett*, 2 Bro. Ca. Cha. 297. *Buckland v. Burton*, (K) *infra*, pl. 3. S. P.

6. £.4000 was settled in trust after the death of the husband and wife, for the children of the marriage, in such proportions as the husband and wife, or the survivor, should appoint. There were four children. By the marriage-settlement of one of them it was recited, that "whereas she was entitled to 1000*l.*, part of "the sum of 4000*l.*, payable at the death of the father: and also "to a sum of 500*l.*, both which would belong to her intended "husband; and whereas the father had agreed to secure an additional portion; in consideration thereof," &c. the settlement proceeded; but no appointment was ever made. This recital was held a good appointment of the 1000*l.*, the mode never being regarded where the intent is clear; and here the father declared her entitled to this sum, and the husband made a settlement in consideration of it. *Wilson v. Piggott*, 2 Ves. jun. 351.

7. Devise of real estate in trust to sell, and the produce, with the residue of the personalty, to be in trust for testator's wife for life, and after her decease, as to one moiety, for such person or persons as she should by any deed or writing, or by will with two or more witnesses appoint; and for want, &c. over. The real estate was not sold. The wife, not having any real estate, by will attested by three witnesses, after bequeathing some specific articles, made this disposition, "all the rest, residue, and remainder of my "estate and effects, of what nature or kind soever, and whether "real or personal, and all my plate, china, linen, and other utensils which I shall be possessed of, interested in, or entitled to at "the time of my decease, subject to all my just debts, I give to "A. B." Held an execution of the power. It would be difficult, said the court, to explain that the widow's interest under her husband's will was not her estate. She had the enjoyment of it during her life, and a power of disposing to whatever person and in whatever manner she pleased, with the small addition of two witnesses. By her will she gave all her estate and effects, with augmentative phrases. But take it according to the strict technical rule in *Clere's* case, that a general disposition will not pass what the party has only a power to dispose of, unless it be necessary to satisfy the words of the disposition, here the widow had no other real estate. *Standen v. same*, 2 Ves. jun. 589. Decree affirmed in *Dom. Proc.* 3 ib. 300. (A).

8. Settlement of an estate in *Yorkshire* to the use of the father for life, remainder to M. his eldest son for life, remainder to his issue in the usual course of limitations, remainder to W. his second son and his issue, in like manner; with power for M. and W., when they should respectively be in the actual possession of the premises, to appoint the same or any part thereof to a wife for her life, for

her jointure. Prior to *M.*'s marriage with *J.* he and his father enter into articles, that, if the marriage should take effect, *M.* should, within twelve months afterwards, settle and assure to *J.* an estate during her life, to take effect from his death, in freehold lands in the county of York, of 100*l.* per ann. or else an annuity of 100*l.* per ann. to be issuing out of freehold lands in the county of York. The father died within twelve months; *M.* took possession and died, without having made any settlement, and without having had any other real estate. Held in Chancery, that the estate was bound by the articles in the hands of the remainder-man; the court conceiving that, at the time of making them, the power was in contemplation of the parties, as the son had no other real estate out of which he could make the settlement; and this being for the consideration of marriage, the court would supply the defect. *Jackson v. same*, 4 Bro. Caf. Chan. 462.

9. Bequest of 1000*l.* consolidated bank annuities, to trustees for the sole use and benefit of testator's daughter *E.*, the same not to be subject to the debts, control, &c. of her then or any after-taken husband; and, at her death, the said sum to be absolutely in her power to dispose of by her last will and testament, or any deed or writing purporting to be her last will and testament, to any person or persons, purpose or purposes, she should think fit; but if no such appointment, then the same to become the property of testator's grand-daughter. *E.*, the daughter, by her will, after giving some specific legacies, proceeded thus: "All my freehold messuages, lands, woods, and hereditaments, and also all my stocks, funds, monies and securities, and all other my real and personal estate and effects whatsoever, I give, devise, and bequeath the same respectively unto," &c. Held at the Rolls, that this amounted to an appointment of the 1000*l.* bank annuities, the bequest of which was not a mere power to dispose, but an absolute gift, qualified only as to *E.*'s situation as a married woman, and to prevent the husband from taking as administrator in case of her death. How otherwise could property be given to a married woman? This must be included in the word *my*, being an absolute interest in her. *Hales v. Margerum*, 3 Ves. jun. 299.

10. By marriage settlement, stock was vested in trustees for *A.*, the husband, for life, and if the wife should survive him, in trust to transfer, &c. the same in such manner and form as *A.*, by his last will and testament in writing, or by any other writing duly executed by him in the presence of two or more witnesses, should appoint; and, in default of appointment, then for the children of the marriage. *A.* died in his wife's lifetime, without having made appointment of the stock; but by his will, after general introductory words, declaring his intent to dispose of his estate and effects, which he had or was interested in, but not noticing his power, or the stock, he gave some small legacies, and appointed his wife and another utors. Held, that the will was not an execution of the executors, the words being applicable only to the testator's absolute property;

property; and this case was distinguished from the two preceding ones, in which the words would otherwise have been inoperative, as the testatrix had no other right of disposition. *Langham v. Renny*, 3 Ves. jun. 467. *Nannock v. Horton*, 7 Ib. 391. S. P. where it was held, there could not be an inquiry into the circumstances of the testator's property.

SECT. V. With respect to the *Time or Event*, at or upon which it may be executed.

1. **M**R. *Hargrave*, in the latter part of note 2. to *Co. Litt.* 113. *a.* observes, that Lord *Coke* takes for granted, that, if there be a devise to *A.* for life, and that, *after his decease, the lands shall be sold by the testator's executors*, they cannot sell the reversion, but must wait till the death of the tenant for life; and that the case there cited from *Bro. Abr. Devise*, pl. 1. countenances this opinion. But the annotator informs us, that in one report Judge *Haughton* argues, that the words "*after the decease of the tenant for life*, mean only to mark the determination of his estates, *not to limit the time for sale*; and therefore, that a sale may be in his lifetime; and that, in another, Judge *Clench* expresses himself almost to the same purpose, 2 *Bullst.* 125. *Godh.* 46. And he adds, that there is also a case against Lord *Coke* in 2 *Leon.* 220. and that the point is doubted in *Cro. Car.* 382.

2. By marriage settlement, lands of the feme were conveyed to the use of the husband for life, remainder to the use of the wife for life, remainder to the use of such child or children of the marriage, for such estate and estates, and subject to such powers, provisoes, &c. as the wife should by deed or will appoint; and for want of such appointment, to the use of such child or children, and his and their heirs, equally, as tenants in common; and for want of such issue, to such uses as the feme should appoint, and for want, &c. to her right heirs. There was issue of the marriage one son. The husband died in the lifetime of the wife; who, by her will, reciting the settlement, gave the premises to the son in fee; but, *in case he should die before 21, and without issue*, then over. The son survived the mother about five years, and then died, an infant and without issue. On a dispute between his heir at law and a claimant under the will of the mother, it was held in *C. B.* that the appointment by the will was void, there being a son then living. And it was said that, as there was issue living at the time of her death, her power to give it to a stranger could never have arisen, for she had no such power, but upon failure of issue; though, added *Lee Ch. J.*, had the son died in her lifetime he might have had the power of disposing it, agreeably to *Holt v. Burleigh*, (stated in 8 *Vin.* 220. pl. 13.) *Doe v. Denny*, cited in 2 *Willf.* 337. 1 *Ib.* 270. *a.* S. C. See *Roe v. Dunt*, 2 *Ib.* 336. *b.* See also *Devise*, (l. 6) *ante*.

3. Lands were devised to the use of *A.* and his issue, in strict settlement, remainder to *B.* and his issue in like manner; with

power for *A.* and *B.* when they should respectively be in possession from *time to time*, by deed or deeds, to assign, limit and appoint to, and for, *any wife or wives*, an estate for life of all, or any part of the said lands, (which altogether, were of the annual value of 190*l.*) In 1712 *A.* married; and by settlement appointed 98*l.* *per annum* to trustees and their heirs, in trust for *E.* his then wife, for, and in name, and in lieu of her jointure; with a proviso, that, if *E.* should not, within three months after widowhood, release her dower, the settlement should be void; and a covenant, that *E.* and his sons by her, should quietly enjoy, according to the limitations of the devise. In 1738, *A.*, by another deed, released the proviso in the former deed; and, in 1751, he, by another deed, reciting the former, and that he had since received 600*l.* additional fortune, appointed in the same form, all the rest of the land to trustees for her during her life after his decease, for increase of her jointure. It was contended, that the additional jointure in 1751, was not warranted; since the power was completely *exhausted* by the *first* deed, which had no express reservation, nor intended any. *Sed per curiam*—"In the natural construction of this power, there was nothing to bound it, but the will and discretion of the husband. The devise was drawn, as if intended, that the power should be executed at different times; '*by deed or deeds, from time to time.*' It has been said, that this was made to take in the case of *subsequent* marriages. The words '*wife or wives,*' would alone have been sufficient to answer that. For, common sense would shew, that one wife must be dead before there could be any new appointment to another. The former words were therefore nugatory, unless thus interpreted. The intention then was clear, namely, that it was originally intended to be awarded at different times, even upon the same woman." And it was observed, that the words of the power in *Harvey v. Harvey*, (stated in 16 *Vin.* 480. *pl.* 12.) were not so strong as these in the present case. It was also argued, that *A.*, by the terms of the first deed, had bound himself from making any further jointure, but this, the court said, could not be inferred. *Zouch v. Woolston*, 1 *Black. Rep.* 281. 2 *Burr.* 1136. S. C.

#### SECT. VI. With respect to the Appointee.

1. A Mother, having a power to dispose of 600*l.* among her three daughters, in *such proportions*, and payable in such manner as she should think fit, gave 300*l.* thereof at different times to one, 200*l.* to another, and 100*l.* only to a third (who had married without her consent). It was held, that the mother was authorized to vary the proportions, she being made the judge; and that, if she made an inequality, the court would not enter into the motives of it, unless it were illusory; as, in a case, where a mother, having such a power, gave only an eleventh part to a daughter; and that, even in such a case, if the child by misbehaviour deserved

deserved it (though it must be very gross indeed), the court would not vary it. In *Maddison v. Andrew*, 1 Ves. 59. See *Lisler v. Robinson*, and *Austin v. Austin* (3 Vin. 437. pl. 11. and vide note) S. P.

2. In *Alexander v. Alexander* (stated in (A. 7) ante) it was said by Sir Thomas Clarke, that the wife, under her power of apportioning the shares, might have given an interest for life in a particular share to one child, or have limited the capital of the same share to another, or even to a third upon a contingency; but that she could not have given any one child *merely a reversionary interest*, for it was intended as a *provision*, and therefore such an appointment would be deemed illusory. 2 Ves. 642. *Adams v. Adams*. (A. 7) sec. 3. pl. 4. sup. S. P.

3. Testator gave all his real and personal estate to his wife, to the end that she might give her children *such fortunes as she should think proper*, or they best deserved; to whom he charged his sons and daughters to be dutiful and obedient. There were five children of the testator who survived him, a son by a former wife, and four daughters by his last. The son had an estate settled upon him of 400*l.* a-year; the daughters had portions of about 500*l.* a-piece. The mother, by will, in execution of the power, devised the estate to trustees to sell; and, out of the money, to pay two of the daughters 200*l.* a-piece, to the son one guinea, and the remainder to two other daughters. Bill by the representative of the son to set aside the appointment as illusory. For the daughters it was said, that the wife had a discretionary power, which she had executed very properly, considering the provision which the son was entitled to; and, though the father might know of that provision, yet he did not mean it should not have weight with his wife in the execution of the power. And Lord Camden being of the same opinion, the bill was dismissed. *Burrell v. Burrell*, Amb. 662. *Macey v. Shurmer*, Atk. 389. S. P.

4. Testator, seised of freehold and copyhold estates, the latter of which had been lately surrendered to the use of his will, after several bequests, gave the residue of his real and personal estate to his wife for life; and then followed this clause: "And my further will is, that my said wife shall, and I do hereby give her full power and authority to dispose of the same, in and by her last will and testament to be duly made, *to and amongst such of my relations as shall be living at the time of my decease, in such parts, shares, and proportions, and as said wife shall think proper.*" After the testator's death, the wife made her will; and thereby, after reciting the power, gave the freehold and copyhold premises to P. T. a relation of her husband, in fee. It was contended that, under the power to give to "*such of*" the testator's relations as, &c. the wife could not elect one only, but was bound to distribute. It was held, however, in B. R. that the power was well executed, the wife's authority being quite discretionary as to the objects. And it was observed, that the case of powers to distribute among *children*, which was there adduced in argument against

the validity of the execution, stood upon very different grounds; since powers of that nature were considered as *portions* for the children. *Spring v. Biles*, 1 *Durnf. & East*, 435. note.

5. By marriage settlement, a manor and lands were limited to the husband for life, remainder to the wife for life, remainder to *all and every* the child and children of the marriage, in *such parts, shares, and proportions*, and for such estate and estates, not exceeding an estate or estates in tail, &c. as the husband should by deed or will appoint; and in default of appointment, *equally*. The husband, by his will, appointed one acre of the premises to his eldest son *A.* and his daughter *B.* for their lives, and the life of the survivor, with remainder to such person as should be entitled to the residue of the premises; and he then appointed the residue to his son *C.* and his issue in strict settlement, with remainder over. *Ld. C. Thurlow* was of opinion, that the execution intended by the testator was totally illusory, and void. *Pocklington v. Bayne*, 1 *Bro. Ch. Ch.* 450. See *Pawlett v. Pawlett* (A. 7) *feet. 2. pl. 1. ante*.

6. By settlement made on the marriage of *A.* with *B.* his wife, lands were limited, in remainder expectant upon several estates which afterwards determined, to the use of *A.* for life, remainder to the use of *such child and children* of *A.* by *B.*, and for such estate and estates, intents and purposes, as *A.* should, by any deed in writing, or by his last will, to be executed, &c. appoint; and for want of appointment, then to the use of *all and every* the same child and children, as tenants in common in fee. There being issue of the marriage two children, a son and a daughter, *A.*, by deed, appointed the premises, after his death, to the son in fee tail, remainder to the daughter in fee simple. This exclusive appointment to the son, it was contended, was not warranted by the power; and *Pocklington v. Bayne* (above stated) was cited. But held in *B. R.* that the power was well executed; *Buller J.* observing, that the terms of it were, "to *such child and children*," and not "to and amongst *all and every*," as in the cited case; and thus the appointor was expressly authorized to give to *one*; and he thought *Spring v. Biles* (*pl. 4. supra*) was with the difference only of *relations* instead of *children*, a stronger case than the present, the power there being, to and amongst, &c. in *such parts, shares, and proportions*, which imported that a *division* was intended. *Swift v. Gregson*, 1 *Durnf. & East*, 432.

7. Feme covert, pursuant to a power, bequeathed, in an event which happened, two third parts of a certain fund worth about 5000*l.* to her children equally, and she gave the remaining third part to her husband for life; and after his decease to be divided among his children in *such share or shares as he should think proper*; and in case her said husband should educate and bring up his sons and daughters, she directed he should have the interests of their respective fortunes. The husband appointed 5*l.* to one child, two other small sums to two other children, and the residue of the third part over which his power extended to three other of the children. At the Rolls:—The intent was to give each child some share; and

and *that* must be a substantial share, or a reason must be assigned. But here no reason was assigned or proved. The appointment was therefore held illusory and void. *Spencer v. Spencer*, 5 Ves. jun. 362.

See Kemp v. Kemp, 1b. 849. The words there were to A. for life, "and then to be disposed of amongst her children as she shall think proper."

8. Voluntary bond to pay 600*l.* "unto and amongst all such child or children of A. as the obligor should by deed or will appoint;" and for want of appointment, to and amongst all such child or children of A. as might survive the obligor. An appointment by will of the whole to one of six children established; the obligor having clearly reserved to himself the power to fix the objects. *Wollen v. Tanner*, 1b. 218.

9. A power, given by will to appoint 1000*l.* for the benefit of a married woman and her family, was held, from the accompanying circumstances, but not as a general rule, to authorize an appointment to the husband. *McLeroth v. Bacon*, 1b. 159.

See (A. 7) sect. 2. *supra*.

(A. 15) To charge, &c. Land, &c. well executed; <sup>16 Vin 481.</sup>  
in respect of *the Person doing it*. *Feme covert*,  
[*Infant*,] &c.

1. ONE seised in fee, on his marriage, settled lands on himself for life, then to his wife for life, remainder to the issue of the marriage, then over. And the deed contained a proviso, that it should be lawful for the wife, *during her life*, to demise the premises to any person for such term, with and under such conditions, rents, and reservations, in such manner to all intents as tenant in tail might do by the statute 32 Hen. 8. The husband died, and the wife married again; and *then* she and her second husband demised the premises pursuant to the power. And two questions were made. First, whether, the lease being made by husband and wife, when the power was given to her alone, this was a good execution thereof, or whether it was not suspended by the marriage? Secondly, whether this lease by the husband and wife ought not to have been made by fine? And it was held, upon the first question, that this was a good execution, notwithstanding the coverture. And, as to the second, that no fine was necessary; for the estate of the lessees was not derived from the lessors, but arose out of the estate of the feoffees or releasees named in the original settlement. And that, therefore, nothing more was requisite to raising it than what was required by the deed which created the power. *Bailey v. Warburton*, Com. 494. See *Harris v. Graham*, stated in 3 Vin. 419. pl. 12. and second point in *Godolphin v. Godolphin*, 1 Ves. 21.

2. The case of *Rich v. Beaumont*, stated in 4 Vin. 168, pl. 26. and 22 Ib. 277. pl. 47. has been since reported in 3 Bro. Ca. Parl.



308. But the reporter, after stating that the court of Chancery directed a case for the opinion of the court of *K. B.* adds, in a note, that, after a very laborious search, he had not been able to discover a single trace of any further proceedings in the cause, except an order of the court of Chancery, directing the case to be settled by the Master, in case the parties differed in stating it. See *Powell on Powers*, 36. S. C.

3. *A.*, having an only daughter about 16 or 17 years of age that had married *B.* clandestinely, who soon afterwards became a bankrupt, by his will devised all his freehold, copyhold, and real estate, and all his leasehold estate to trustees, their heirs, executors, administrators, and assigns, in trust to apply the residue, after paying their own charges, to the sole use of his daughter during her life, and not to be subject to the debts or control of her husband, and to permit her by deed or writing, executed, &c. notwithstanding her coverture, to give and dispose of all his freehold, copyhold, and leasehold estate as she should think fit, she having a particular regard to his poor relations in *Cornwall*; and he gave to the same trustees, whom he made joint executors, his personal estate, in trust for the separate use of his daughter. *A.* died soon afterwards. His daughter, being under 21, though above 17, after her husband's bankruptcy, and whilst living separate from him, made her will, and thereby, in pursuance of the power given her by her father's will, bequeathed to her daughter *M.* 3000*l.* to be paid her at 21, with a provision for her maintenance in the interim. She then gave legacies to some poor relations, appointed the two trustees in her father's will, and two others joint executors, guardians, and trustees to her daughter, and then devised the residue of her real and personal estate to the plaintiff. One question was, whether the will of the daughter was a good execution of the power in her father's will as to the real estate? Lord *Hardwicke* remarked, that this question had never been determined that he knew of. He could find no case where a power, given generally, could be executed by an infant; and therefore he would make none. As to the general question concerning powers, it must be admitted, he said, that there were some powers which an infant might execute, as, where he was a mere instrument, or conduit pipe, where no prudence or discretion was required, or where his right was not affected. But this case was a power coupled with an interest. Besides, there was an objection upon the penning of the power, against the daughter's executing it during infancy, for the testator, having the coverture in view, had excluded that disability, giving her power to dispose, notwithstanding it; and would also have excluded the case of infancy, had he so intended. And his lordship was of opinion, that the power was not well executed as to the real estate: but, as to the personal estate, as the feme was above the age of 17, at which age, if sole, she might have made a will thereof, *that* was clear of the principal objection made as to the real estate; and therefore the

the power was held to be well executed with respect to it. *Herle v. Greenbank*, 3 *Ath.* 696. 1 *Ves.* 298. S. C.

Mr. Hargrave in note Q Co.

Litt. 113. a. entertains the opinion, which he fortifies by a train of argument and authorities, that a power to sell, when given to executors, *eo nomine*, will go to the survivor; by reason that it is annexed to their office and character, which itself survives.

(A. 16) Suspended, determined, or extinguished. 16 Vin. 483.

1. BY the marriage settlement of *A. B.* lands were limited to him for life, remainder over in strict settlement; with a power for the tenant for life in possession to make leases for 21 years *in possession*, reserving the best rent. *A. B.* by lease and release, conveyed all his life estate to *C.* and his heirs, in trust to apply the profits in payment of an annuity of 150*l.* to *W.* during the life of *A. B.*, and the surplus to *A. B.* The year following he conveyed all his estate to trustees for 99 years if he should live so long, for payment of his debts; but with an express reservation of all leases granted or to be granted. Afterwards, he made a lease of the lands in question to *L.* according to the terms of the power. It was contended, *first*, that after the conveyance to *C.* it was impossible for *A.* to grant a lease *in possession*, he having thereby parted with the whole of his life interest; and therefore the lease to *L.* could not, in fact, commence till after *A. B.*'s death, who had no authority to grant such a lease: *2dly*, that by the conveyance to *C.* the power was extinguished, with respect to *A. B.* Lord Mansfield observed, *1st*, that it was not necessary that the grantor should have *actual* possession to execute the power; but he thought possession there meant the receipt of the rents and profits, which were applied to his use. *2dly*, That where, indeed, the whole life estate is conveyed away, the power must be at an end; but that the conveyance here was only to let in a particular charge, subject to which the rents still belonged to *A. B.* The power was therefore held to be subsisting, and well executed. *Renn v. Bulkeley*, 1 *Dougl.* 291. See *Goodright v. Cater*, (E.) *pl. 4. post.*

2. Bequest of residue of personalty to trustees for *A.* for life, and then to and among all and every the children and child of *A.* if more than one, in such shares and manner, for such interests, &c. (in the fullest terms,) as *A.* should appoint; and in default, &c. to vest at 21. *A.* had two children, one of whom attained 21, and died in her lifetime. *A.* afterwards appointed the bulk to the surviving child; and held good, though only one object remained. *Boyle v. Bishop of Peterborough*, 1 *Ves. jun.* 299.

3. But where there was a power to appoint among children an appointment to one who was dead, so as to vest it in the representative, was rejected, the objects being personal. The death, however, of that one did not affect the power as to the rest. *Maddison v. Andrew*, 1 *Ves.* 57.

4. Mr. Butler, in note 1. *Co. Litt.* 342. *b. et seq.* has laid down and substantiated, by a train of argument and authorities, several rules respecting the *suspension and extinction of powers*. These he premises with a general division of powers, distributing them into powers *collateral* to the land, *i. e.* which are given to mere strangers, who have not any interest in the land; and powers *relating to* the land, *i. e.* which are reserved to persons who have either a present or future interest in the land. And this latter sort he subdivides into two classes, powers *annexed to the estate in the land*, and powers *in gross*; the former being, where a person has an estate in the lands, and the estate to be created by the power is to take effect in possession *during the continuance* of the estate to which the power is annexed; (such as the power of leasing in possession given to *A. B.* in the above-stated case;) and the latter being, where a person has an estate in the land, but the estate to be created by the power is not to take effect till *after the determination* of the estate to which it relates; such as a power to jointure an after-taken wife. As to powers *collateral* to the land, the annotator informs us, that a fine, feoffment, or common recovery will not extinguish or destroy them, nor can they be released. As to powers relating to the land, such of these as are in the nature of powers *appendant to the estate*, may be extinguished by release, feoffment, fine, or common recovery, and are also liable to be suspended or extinguished even by any of the conveyances which are said *not* to operate by transmutation of the possession, as bargain and sale, lease and release, and covenant to stand seised; and, as an assurance of this nature, which carries *the whole* of the grantor's estate, is a *total* destruction of the powers appendant to it, so, such as carries *only a part* of the estate, *suspends*, during the continuance of that estate, the exercise of the power, or at least the estate to be raised by it; and any such assurance, which induces only a charge upon the estate, necessarily subjects the estate to be created by the power to that charge. (See letter (C) *post.*) Next, with respect to powers *in gross*, these, we are told, are not affected by bargain and sale, lease and release, or covenant to stand seised. And this, if the appointor even makes a conveyance in fee, by any of these assurances, as they do not pass a greater estate than the grantor has a right to convey. But, if he conveys by fine, feoffment, or recovery, *which assurances convey a tortious fee*, the power will be extinguished. A power *in gross*, it is added, may be also released to those in remainder. But Mr. Butler observes, that, although it is said, that a feoffment, fine, or common recovery *may* extinguish powers *annexed to the estate*, or *in gross*, yet they do not *unavoidably* extinguish these powers in all cases; and he instances the Earl of *Leicester's* case, (stated in 16 *Vin.* 491; 2. *pl.* 14) and *Herring v. Brown*, (stated in *ib.* 494. (E) *vide* note to *pl.* 3.); in both which cases the deed and fine operated as an execution of the power, and *not* in extinction of it. See *Ingram v. Parker*, stated in (C) *post.* See also *Butl.* note, stated in *Suppl. tit. Recovery*, (W) *post.*

(A. 17) Defective Execution. *Supplied in Equity.* 16 Vin. 483.

1. **T**HE Master of the Rolls, in *Fitzgerald v. Lord Falconberge*, (stated 16 Vin. 492. pl. 20. and since reported in 3 Bro. Par. Ca. 543.) observed, that the second position of Lord C. King, in *Sayle v. Freeland*, (stated in 16 Vin. 496, 7. pl. 2.) that, *if the power, in that case, had not been strictly executed, equity would help in such a little circumstance, where the owner of the estate had fully declared his intent*, was going too far, unless there was some equitable circumstance in the case; for it was contrary to the resolution in the case of *Bath v. Montagu*, (stated in Co. 14. ante.) See *Powell on Powers*, p. 152. et seq.

2. In the case of *Smith v. Ashton*, (stated 16 Vin. 483. pl. 3. and side note,) one circumstance should be attended to, namely, that the estates chargeable with the portions were, soon after the death of A., settled by R. (the eldest son of A.) upon his marriage, on his wife, (who had 500*l.* for her portion,) and the issue of the marriage, *without notice* of the notes in writing prepared by A., which were afterwards found by the verdict to be his will.

3. A. upon his marriage covenanted, that his estate should be chargeable with 1000*l.* for the benefit of younger children: and his wife having an estate of her own, she and her husband, after marriage, levied a fine of it, and the uses declared were, that A. and his wife should have a power, by any deed or writing under their hands and seals, or the survivor of them, by his or her last will, *to appoint and divide the estate among their younger children*, in such proportions as they or the survivor should think proper. A. survived, and by his will gave his daughter, (who was the only younger child) 3000*l.* which, he declared, should be in lieu and in full satisfaction of the 1000*l.* covenanted to be raised out of his own estate, and he charged the 3000*l.* on his wife's estate, intending thereby to execute his power. Lord Hardwicke was of opinion, that the power was, *in substance*, well executed. It was true, the direct terms of the power were not pursued; but the *intent and design* of it was: it was admitted, that the father might have appointed *part* of the estate to be sold, and the money raised by such sale. And what was done was exactly the same thing. The court might order a sale; and, though the will might not enure as a good execution of the power in strictness, yet, within the meaning and design of it, it was a good charge for the young lady's benefit. *Roberts v. Dixall*, 2 Eq. Ca. Abr. 668. pl. 19.

4. M. having a power of charging a real estate with 4000*l.* by deed or will, executed in the presence of *three* witnesses, to any person she should appoint: she, being about to marry, by articles, executed in the presence of *two* witnesses only, appointed 2000*l.*, part of the 4000*l.*, to be for the use and benefit of her intended husband *during her coverture*; and after her death to her son. The other 2000*l.* she made a voluntary disposition of by will; but  
did

did not execute it in the presence of *three* witnesses. The first question was, Whether the articles entered into upon the marriage amounted to an appointment of the first 2000*l.* within the power? Lord *Hardwicke* was of opinion that they did; for that, notwithstanding it was insisted, that it was a defective appointment, because there were only two witnesses; yet this court could supply that defect, when it was executed for a *valuable* consideration, *much more* when it was an execution of a trust only, as was the case here. But, as to the other 2000*l.*, which was voluntarily disposed of, as the power was not pursued, the appointment was held to be void. *Sargeon v. Sealy*, 2 *Atk.* 412.

5. Lands in *W.* were limited to *J. M.* for life, with remainder to such child or children of his body by *C.* his then late wife, for such estates, and in such shares, &c. as *J. M.* should by any deed or deeds, will in writing, or other writing or writings, duly signed and executed in the presence of *three* or more credible witnesses, direct or appoint; and in default thereof, to such children as tenants in common in tail. Upon the marriage of *A. M.*, one of the daughters of *J. M.* by *C.*, with *R. S.*, the said *J. M.*, by indentures of lease and release, in consideration of the marriage, and of a settlement, thereby made of real estates on the behalf of *R. S.* granted, released, and confirmed the lands in *W.* to trustees, to the use of *R. S.* for life, remainder to trustees, to preserve, &c. remainder to *A. M.* for life, remainder to the issue of the marriage in the manner therein mentioned. The release was executed by *two* witnesses only. It was contended that, although this deed was a defective execution of the power given to *J. M.*, yet it ought to be supplied by the court, being in consideration of marriage. And Lord *Thurlow*, being of that opinion, decreed accordingly. *Wade v. Paget*, 1 *Bro. Ca. Cha.* 364. See *Godolphin v. Godolphin*, (A. 12) *sec.* 2. *pl.* 1. *supra.* and *Jackson v. Same*, (A. 14) *sec.* 4. *pl.* 8. *supra.*

6. Defects in the surrender of copyholds, and in the execution of powers are governed by the same rules. In *Chapman v. Gibson*, 3 *Bro. Ca. Cha.* 229. See *Supl. tit. Copyhold*, (M. a) *ante.* See (A. 14) *sec.* 3. *supra.* (A. 20) *pl.* 1. *infra.*

16Vin. 487. (A. 20) Powers in general, Construction thereof, and of the Execution thereof.

1. ON a marriage, 1200*l.* 3 *per cent.* consols were settled on the husband for life, and then to the wife's appointment. The husband afterwards, on a separation, gave up his life interest for the wife's benefit, so as to let her power extend over it. The wife, by her will, disposed of different sums in the 3 *per cent.*; but directed, that if any of the legatees, except one of them, should die before her husband, their legacies should revert to testatrix's executors. In a subsequent part of the will she stated, that the money bequeathed was in the 3 *per cent.* consols, *the interest whereof*  
*her*

her husband was to enjoy, according to articles of separation between them, until his death. Although the testatrix clearly mistook her power, yet the Chancellor would neither decree payment nor declare the legacies vested; as there were no words to shew, what her will would have been, if she had understood her power; and to guess it would be going further than the court had ever done. *Smith v. Maitland*, 1 *Ves. jun.* 362.

2. By marriage articles certain monies were agreed to be vested in trustees to pay the yearly produce in certain proportions between the husband and wife for the wife's life; and if he should die before her, leaving issue by her, then, after her decease, to apply the capital in such manner as the husband should appoint by any deed or writing, attested, &c. or by his will; and for want of appointment, the capital to be divided among the issue of the marriage, share and share alike, at 21. Held, under the whole of the circumstances, that the father's power was not general, but confined to the issue of the marriage. In *Bristowe v. Warde*, 2 *Ves. jun.* 336.

3. One having a power by marriage settlement, to charge with an annuity an estate, of which he was tenant for life, with remainders to the issue of the marriage, and with an eventual remainder to himself in fee, executes the power by will. The contingent fee afterwards vested in him. Held, that though by the accession of the fee the power was gone, yet the gift should take effect out of his interest. *Croft v. Hudson*, 3 *Bro. Cas. Cha.* 30.

4. A power to fell timber with the consent of four trustees, was held not to be extinct by their deaths; but the court reserved the check. *Hewit v. Hewit*, *Ambl.* 508.

5. A power, when exercised, takes place of all the uses and estates in the original deed to which it is not declared subject. In *Mosley v. Mosley*, 5 *Ves. jun.* 248.

6. A power to revoke uses and appoint a-new, by deed inrolled, was held ill executed, where the inrollment was not made till after the appointor's death. *Hawkins v. Kemp*, 3 *East*, 410.

7. G. having a power to charge his wife's estate with 2000*l.*, by his will appointed it to different persons, and died indebted. Lord *Hardwicke*—"I am of opinion this ought to be considered "part of G.'s personal estate; where there is a general power "given or reserved to a person for such uses and purposes as he "shall appoint, this makes it his absolute estate, and gives him "such a dominion over it, as will subject it to his debts." And his lordship directed the personal estate to be first applied in payment of the debts, then the real estate descended, and then the 2000*l.* *Bainton v. Ward*, 2 *Atk.* 172. and cited 2 *Ves.* 2.

8. So where one having a power to charge money on land, executed it by a voluntary deed and died, the court held the charge to be personal assets in favour of creditors. *Park v. Bathurst*, 3 *Atk.* 269. *Troughton v. same*, *ib.* 655. and 1 *Ves.* 86. S. P. So also in *Townshend v. Windham*, 2 *Ves.* 1. where there was a covenant in a certain event to allow such person as A. should by deed

or

or will appoint to receive the rents of an estate for a particular period. *A.* appointed, and the rents were rendered assets: but note these words of Lord *Hardwicke*: "It is insisted for the plaintiffs (the creditors) that this is such a kind of interest granted, as the testator would be entitled to the benefit of, although he made no particular appointment; but on consideration, I am of opinion that, without making a particular appointment, neither he, nor any in his place, could have any benefit of this covenant; for, taking it in any light, it must be considered as a covenant or grant of the interest in the land. Perhaps it partakes of both; but, considering it as a covenant, what action of covenant could have been maintained by the executors of the testator upon this deed, until appointment made by the testator? The very words shew there could be none: considering it in another light, as a grant of the interest in the land, it was such as could not take effect until he made an appointment, for until then there was really no grant." *Id.* p. 9.

16 Vin. 489. (C) What shall be a good *Revocation* according to the Power.

See the following Cases, stated in (A. 14) *ante*.—*Hubbard's Case*.—*Roscommon v. Foulkes*, *sect.* 1.—*Bath v. Montagu*, *sect.* 2.

1. THE most circumstantial statement given by *Viner* of Sir *James Perrot's* case, with respect to its principal point, which concerns the subject of the present section, will be found in 22 *Vin.* 227. *pl.* 9.

2. It was contended by Lord *Hale*, (on observing upon the case of *Ingram and Parker*,) contrary to the opinion of the three judges who decided it, that a bargain and sale, although *not enrolled*, and fine afterwards, would be a good execution of a power to revoke under hand, within *Scroop's* case, stated in 16 *Vin.* [(C) *pl.* 1. namely, as an act of the donee of the power, which could not have any operation, *unless* it could take effect as an execution of the power; because the bargain and sale, *without enrollment*, would be void; but the fine alone would have been an extinguishment, nor would a deed of covenant to levy a fine have been of itself a sufficient revocation, since it must have referred to a future act.

16 Vin. 493. (E) Power of Revocation [or other Power] extinguished or determined, by what Act.

1. IN the case of *Fitzgerald v. Lord Fauconberge* (stated in 16 *Vin.* 492. *pl.* 20. and since reported in 3 *Bro. Par. Ca.* 543.), besides the question respecting the validity of the execution of the power of revocation, a second question was made, *viz.* whether the

the deed of 1715 was a *total* revocation, or only a revocation *pro tanto* of the deed of 1712 there mentioned; and it was held to be a *total* revocation, and thus the power extinct.

2. But, in the case of a *mortgage* by the donee of a power, *equity* considers it only a revocation *pro tanto*, since there the mortgagor still continues to be owner of the estate, subject to the charge, as in *Perkins v. Walker*, stated in 8 *Vin.* 153. *pl.* 7. and *file note*, and *Thorne v. Thorne*, stated in 16 *Vin.* 495. *pl.* 11. See *Devise* (R. 6) *ante*.

3. The following is a more circumstantial statement of the case of *Leigh v. Winter* than that contained in 16 *Vin.* 494. *pl.* 7. — *A.* conveyed lands to the use of himself for life, remainder to his son in tail; with a power of revocation, if his son married without his consent. Afterwards, by deed between him and his son's grandmother stating the power, and certain *considerations* given to *A.*, it was agreed, and *A. covenanted, granted*, and agreed with the grandmother, that he would not revoke any of the uses or estates limited to his son, nor execute any power of revocation concerning the same, without the previous consent of *B.* in writing; and that any such revocation, &c. should be void. The son afterwards married without the consent of *A.*, who thereupon *alone* revoked the settlement. It was held by Lord Ch. J. *Brampton* and *Jones J.* who were called into the court of Chancery to assist, that, by the second indenture, the power of revocation, which was absolute in the first, was restrained by the second deed, and could not be executed without the consent of *B.*; for the power was executory, and by subsequent agreement might be defeated. *Sir W. Jones*, 411.

4. By marriage settlement, an estate was limited to *A. B.* for life, remainder over; with a power to *A. B.* to sell the premises, and for that purpose to revoke the uses. *A. B.*, for securing to *H.* an annuity of 500*l.* sold by him to her for a valuable consideration, by indenture, granted the premises to *H.* for 99 years, if *A. B.* should so long live; and the next day took a demise thereof for 98 years and 11 months, at a rent of 500*l.* *per annum.* *A. B.* afterwards sold the estate, and, pursuant to his power, revoked the old uses, and limited the estate to the purchaser in fee, who at the time of his purchase had notice of the annuity. A dispute arose between *H.* and the purchaser, which depended upon the question, whether the same *A. B.* who made the demise to *H.* for a valuable consideration (the right to make which demise arose out of the nature of his estate) could be authorized to revoke it himself under any power in any settlement? And it was argued, on behalf of the purchaser, that a tenant for life, who had only a qualified or defeasible interest, could not alien the estate for his own life, discharged from the qualification that affected it in his own hands. That, therefore, every one who took an estate under him must take it as he held it, subject to the operation and consequences of the power of revocation. Lord *Mansfield* observed, that a gross fraud was attempted in this case, either upon



the purchaser, or *H.* If the purchaser, he said, did not know of the incumbrance, then it was a fraud upon him; but it was found he knew of it, and therefore the fraud was upon *H.* And the court of *B. R.* unanimously held, that the demise to *H.* was not affected by the subsequent revocation. *Goodright v. Cator*, 2 *Dougl. C.* 478. See *Snape v. Turton*, stated in 16 *Vin.* 490. *pl.* 2.

5. A power of revocation to one, who becomes bankrupt, is destroyed by the bargain and sale of the commissioners. 1 *Com. Dig.* 530.

6. By settlement of an undivided third part of estates three powers were given, first, to husband and wife jointly to raise and appoint 3000*l.*, secondly, to husband alone to raise and appoint 2000*l.*, thirdly, to the survivor to raise and appoint such a sum as, with the money before raised under the other powers, would make up 5000*l.* There was also a power to the husband and wife to revoke all the uses for the purpose of selling or exchanging. The wife joined the husband in raising for his benefit 3000*l.* under the first power; and he covenanted with the trustees, that he would not, *during her life, and so long as the 3000*l.* should remain due*, charge under his sole power, or any other power, without her consent. After her death, he, by deed poll, charged with 2000*l.* more, to be paid his executors, and applied in payment of his debts and legacies, and otherwise in performance of his will, or as he should appoint by it. He afterwards revoked the uses for making a partition, whereupon specific parts of the estates were conveyed in severalty to the uses of the settlement, subject only to the 3000*l.* He then married again and died, leaving his second wife his executrix, without noticing the charge by his will; but the deed poll was found uncanceled among his papers. Held, that the 2000*l.* was well charged and went to his executrix, the covenant only preventing any further charge during the wife's life, who, had she survived him, would have been prejudiced by it; nor did the revocation for the purpose of partition affect the charge, the intent being to lay all the charges which were upon the undivided third part upon that which was to be taken in lieu of it. As to the deed remaining in his custody, nothing was to be inferred from that, since it was not to take effect till after his death. *Earl of Uxbridge v. Baily*, 1 *Ves. jun.* 499.

7. The benefit of a power given by will to charge leaseholds for lives which were devised by it after the manner of strict settlement, with 500*l.* for renewal of the estate from time to time, was held to be lost to a tenant for life, who had taken a new lease to himself, his heirs, and assigns, and paid a large renewal fine, without communication with the remainder-man, or exercising his power at the time. In *White v. White*, 4 *Ves. jun.* 24.

8. A power to sell timber with the consent of four trustees, did not become extinct by their deaths, but the court reserved the check. *Hewit v. Hewit*, *Ambl.* 508.

9. See *Croft v. Hudson* (A. 26) pl. 3. *supra*, where a power, which was exercised by will, having afterwards become extinct by the devolution of the fee to the appointor in his life, it was held, that the gift should take effect out of his interest.

(I) In what Cases *new Uses* may be limited ; and how. 16 Vin. 498.

1. SEE *Chadwick v. Doleman*, 3 Vin. 423. pl. 46. where an appointment pursuant to a power, of a portion, by deed, without a power of revocation, to a second son, who afterwards became an eldest, was held defeasible, and to be accordingly revoked by a subsequent one to a daughter ; not from any power of revoking, or upon the words of the appointment, but on account of the alteration in the capacity of the son.

2. The first point which arose upon the case of *Adams v. Adams*, stated in (A. 7) *ante*. was, whether, there being no power of revocation reserved in the deeds of the 3d November 1758, creating the power of appointment, nor in the deed dated the 20th October 1764, enabling the survivor of the husband and wife to make an appointment, B., by the deed of the 4th July 1767, and A. and B. by the deed of the 29th November 1758, exhausted the powers contained in the deeds of the 3d November 1758, and the 20th October 1764 ? And it was held they had not ; for, the deed of the 29th November 1758, was revoked by the subsequent instruments of the 24th September and the 20th October 1764 ; and the appointment by B. of the 4th July 1767, was revoked by the deed of the 25th October 1771. The validity of which latter revocation must have depended upon her right to appoint with power of revocation. See (E) *supra*.

(K) Power, *assignable*, or not.

1. ONE, by marriage articles and settlement, had a power of disposing of a reversionary interest in copyhold land, (subject to an estate for life in his wife,) among the issue of the marriage, in such shares and proportions, as he should think fit ; and for want of such appointment by the husband, then the reversionary interest was to go to his right heirs. The power was directed to be executed by deed in his lifetime, or by will at his death. He, by his will, reciting the power under the articles and settlement, delegated it to his wife, that she might, in such shares and proportions as she should think fit, dispose of it between his son and daughter ; and for want of such appointment, he gave it in equal shares between his two children. *Et per curiam*—This was to be considered as a power of attorney, which could be executed only by the husband, to whom it was solely confined, and was not, in its nature, transmissible or delegatory to a third person ; therefore the intermediate appointment to the wife, under the will was ab-

absolutely void; and the latter part, where he gave it in equal shares between the two children, was a good appointment within the marriage articles and settlement. *Ingram v. Ingram*, 2 Atk. 88.

2. Where a personal estate was given to such charitable uses as *B.* should appoint; a direction by *B.* that the money should be applied as his brother should appoint, was disallowed by the court. *Attorney-General v. Berryman*, cited 2 Vesf. 645. See *Alexander v. Alexander*, (A) ante, S. P. with respect to the discretionary power given to *M.* and *J.* over the share of *F.* See also *Pease v. Mead*, 5 Vin. 117. pl. 2. and side note.

3. So where part of the condition of a bond was for payment by *B.* of such a sum of money to such person as *A.* should by will appoint, and *A.* made her will, in which she referred to a former bond given to her by *B.*, but which was afterwards cancelled, but did not at all notice the bond or the power. Then came the following disposition: "And as to all the rest, residue, and remainder of my ready money, personal estate and effects whatsoever and wheresoever, not herein before given and disposed of, (except the sum of 10*l.*, which I give and bequeath to *A.*, to be paid to him by my executor immediately after my decease) I give and bequeath the same to *M. B.* for his own use." This bequest being clearly held not to amount to an execution of the power, the court of *C. B.* were of opinion that, as there was no duty in the wife herself, the money could not pass to her executor as her assignee in law, in which character only he could claim it. With respect to some cases cited on the other side, where money so circumstanced had been made assets in favour of creditors, these they said had been decided on principles peculiar to a court of equity. *Buckland v. Barton*, 2 H. Bl. 136.

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## Prescription.

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27 Vin. 255. (A) [*Who.* And] by what Names they may prescribe, [though they hold only at Will, &c.]

1. A Person cannot prescribe for right of common as occupier of a messuage. *English v. Lurnell*, 2 Willf. 258.

2. But an occupier of a messuage and lands who has common in the lord's waste may set up a custom to cut rushes as annexed to his right of common. *Bean v. Bloom*, 2 Black. Rep. 926. 3 Willf. 456. S. C.

3. If tenant for years pleads a prescription in his own name, it is bad. It ought to be in the lord's, who is tenant in fee. *Smith v. Morris*, Fortesc. 340.

(D) *What shall be a good Prescription. Where it is* 17 Vin. 262.  
*uncertain.*

**T**RESPASS against a servant of the corporation of *P.* for taking three bushels of barley. Plea, that one *R. D.* was seised in fee of the manor of *P.*, and that he and all those whose estate he had, at their own cost time out of mind repaired, and ought to repair the quay, and had of right taken a reasonable duty called bushelage, viz. three *Winchester* bushels of barley out of and for every ship's cargo of barley brought upon the said quay to be exported in any ship. It then derives title from *R. D.* to the corporation of *P.*, and justifies taking under the custom by their command. The prescription being traversed in the replication, a verdict was found in favour of it. Upon a motion in arrest of judgment, one point made was, that the custom was void for uncertainty, the word *cargo* being too general. But held *per cur.* to be good; for the word *cargo* is a mercantile term, and when referred to a ship is very intelligible, and must mean the whole loading. *Sargent v. Read*, 2 *Stra.* 1228. 1 *Wils.* 91. S. C.

(L) Against the Law of the *Land* and Common 17 Vin. 268.  
Right.

**S**PECIAL action upon the case: That whereas the plaintiff is seised of the rectory impropriate of *A.*, and has right of common in a certain field containing 110,000 acres, and that the defendant inclosed part of that field, whereby the plaintiff could not enjoy his common in so ample, &c. Defendant pleads, 1st, the general issue. 2d, A special justification, that he was possessed of certain land in the said common field, and that it had been a custom time out of mind for all those who had any lands in the same field to inclose as much thereof *ad libitum* as they pleased. Plaintiff traverses this custom, and issue being joined it was found for the defendant: On motion for a new trial it was held in *B. R.* that this was a good custom, and in the nature of shack. 2d, *Per Lee*, C. J. and *Denison*, J. In an action upon the case, this custom might be given in evidence upon the general issue; for it proves the defendant not guilty of the *gravamen* laid in the plaintiff's declaration. *Barber v. Dixon*, 1 *Wils.* 44.

(T) *Destruction.* What may destroy it. 17 Vin. 277.

1. **A**N ancient grant without date (as of common of pasture) does not necessarily destroy a prescriptive right to the same thing; for it may be either prior to time of memory, or in confirmation of a prior right, and it ought to be left to the jury

whether either of these is the case. *Addington v. Clode*, 2 *Black. Rep.* 989.

2. On an information for stopping up a common footway, the prosecutor proved that it had been a common passage as far back as any witnesses could remember. But defendant produced a lease of the way for 56 years, that it might be a passage during that time, and that the term was expired. *Raymond, C. J.* held defendant not guilty; and that leaving it open 4 or 5 years after the expiration of the lease will not amount to a gift to the public. *Rex v. Hudson*, 2 *Stra.* 909.

27 Vin. 283.

### (Y) Pleadings.

1. **TRESPASS** founded upon a prescriptive right of burial of any person dying in plaintiff's house at O., in the chancel of the church of O., in the exercise of which defendants disturbed him. A case being reserved at *nisi prius*, it stated, that the plaintiff had such prescriptive right, and that defendants *did* disturb him in burying; *Sc. and were wrong-doers*: but it was also stated that 2s. was due to the parish of O. for every person buried in the chancel of that church. Held *per cur.*, that where a person claims a servitude upon another's property, he must lay and prove the whole of it against the owner. But in an action against a wrong-doer, as is the present case, it is only necessary to set out the right, in the enjoyment of which plaintiff was disturbed. 2d, The right in the churchwardens to the 2s. for every burial is not part of this prescription, but either a customary payment, or at least a collateral prescription. *Waring v. Griffiths & al.*, 1 *Burr.* 440.

2. A plea of prescription for common in a *que estate* is good after verdict, though it be not in *express* terms alleged that the owners of the estate have used it from time immemorial. *Clarke v. King & al.*, 3 *Term Rep.* 147. *Vide Addington v. Clode*, 2 *Black.* 990.

3. If to an action of trespass in the common called A. the defendant plead that A. and B. commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the whole prescription. *Morewood v. Wood & al.*, 4 *Term Rep.* 157.

4. Replevin. Avowry that defendants were *owners and occupiers* of certain messuages, and prescribe for common in the *locus in quo* as such, and avow damage feasant. Verdict for defendant. Upon motion in arrest of judgment this was held bad; for confessedly it is bad where it would be necessary to set forth a title. And though in trespass there is no occasion to set forth a title against a stranger, yet in replevin it is different, because the avowant being to have a return of the cattle must shew a title *in omnibus*. *English v. Burnell & al.*, C. B., 2 *Wils.* 258.

## Presentation, Parson, Patron.

[ A ]

### (G) The Interest of the Parson in the Church and 17 Vin. 301 Church Yard.

1. **W**HERE a lecturer has usually been appointed by a parish, but there is no certain custom as to the election, nor any fixed stipend, the court will not compel one to be licensed by the bishop when another has been admitted by the rector; for the rector might refuse him the pulpit, the fee being in him. *The King v. The Bishop of London*, 1 *Wilf.* 15. S. C. 2 *Stra.* 1192.

2. Nothing is so clear as that no man can be a lecturer and use the pulpit of the rector without his consent. But if there has been an immemorial usage, the law supposes there was a good foundation for it. If the lectureship be endowed, that affords a strong argument to support the custom. *The King v. The Bishop of London*, 1 *Term Rep.* 333. S. P. *The King v. Field*, 4 *Term Rep.* 125.

### (I) Power of the Parson, Patron, and Ordinary, jointly.

**T**HERE have been cases since the disabling statutes where decrees have been made confirming compositions relating to the rights of the church, which have been made by the parson, patron, and ordinary, where it has been for the benefit of the church. *Douglas v. Vane*, 1 *Wilf.* 128.

### (P) Chapel.

1. **A** Bill in equity lies in the name of a chaplain or curate to establish his right; but not an information in the name of the attorney-general, unless for charities, as augmentations of vicarages are. *Brereton v. Tamberlane*, 2 *Ves.* 425.

2. The right of baptism, burial, and divine service in a chapelry, and the circumstance of the inhabitants of the chapelry not having those rights in the parish-church, nor being rateable to it, are evidence of a perpetual curacy or chapelry; whereas, chapels of ease have no parochial rights, and the inhabitants are not exempt from contributing to the mother church, and such chapelries are determinable *ad libitum*. *Ibid.*

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## Presentation, Parson, Patron.

3. The small tithes and surplice fees having been always enjoyed by the curate, and his having received an augmentation under 29 *Car. 2. c. 8.* are evidence of a perpetual curacy. *Ibid.*

4. There are several instances in the kingdom of an union of parishes, where one is considered as the parish church, the other is kept up as a parochial chapel for the convenience of the inhabitants; a chapel having parochial rights, and the presentation to the parish church always being *cum capella annexa*, are evidence of this species of union; and in such case the right of nomination shall be presumed to be in the vicar of the parish church, who has the general cure of souls, rather than in the rector; and may be by parol. *Per Lord Hardwicke. Ibid.*

5. Where there is a parish of which the cure of souls is in a chaplain or curate, the minister's having from time to time attended the visitations of the bishop, is evidence of its being a pre-sentative perpetual curacy, and not a donative, and therefore a licence is necessary to complete the title of an incumbent. *Powell v. Milbank, 1 Term Rep. 399. (note.)*

6. On a commission of charitable uses, it was agreed between the lord of the manor of *A.* and the inhabitants of *W.* within the manor, that certain copyhold lands should be let for the maintenance of a stipendiary curate of the chapel of *W.* to be nominated by a majority of the inhabitants, and to be allowed by the lord, and by him presented to the ordinary for a licence to preach, and the usage had been accordingly; the lord having refused to present the nominee of the majority of the inhabitants, the latter prayed a *mandamus*, which the court refused; for their right is either a mere trust, and then their relief is in equity; or it is a legal right, and then a *quare impedit* will lie; for where the presentation and nomination are in several, and either impedes the other in his right, *quare impedit* lies. In such case the person having the right of presenting is to judge of the qualification of the person nominated, in the same manner as the bishop does; but if he object on the ground of immorality, that must be tried by a jury. *The King v. The Marquis of Stafford, 3 Term Rep. 646.*

7. A *mandamus* to a bishop to license a curate of an augmented curacy was refused, because the party had another specific remedy by *quare impedit*. *The King v. The Bishop of Chester, 1 Term Rep. 396.*

27 Vin. 311. (Q) Spiritual Promotion, what shall be said to be.

**I**N a title for holy orders, the undertaking of the rector to continue his curate till he shall be otherwise provided with some *ecclesiastical preferment*, is not discharged by the curate's accepting the readership in the same parish; for the readership is determinable at pleasure, and may be exercised by a layman. *Martyn v. Hynd, Dougl. 146.*

(R) Donative.

**I**N the case of a *presentative* benefice the patron has his private interest and right of presentation, the ordinary has the right of admission, institution, and induction of the clerk. In the case of a *donative*, both the public and private act to be done are in the donor: nothing is in the bishop. But still a donative, especially with cure of souls, has all the properties of ecclesiastical benefices. The incumbent must be 23 years of age; in deacon's orders; must subscribe and read the 39 articles; must read the Common Prayer; and take the oaths of allegiance and supremacy; for these are not against the right of the donor; they are checks on the political tenets of the incumbents, as the bishop has jurisdiction over their moral characters. *Powell v. Milburn*, 3 *Wils.* 365.

(D. a) In what Cases the King shall present.

17 Vin. 319.

1. **W**HERE the incumbent of a living was promoted to a bishoprick, and died before a presentation by the crown, it was held by the court of King's Bench, and by all the judges, that the king might present notwithstanding his death; but the house of lords reversed the judgment; it is uncertain upon what grounds. *Rex v. Archbishop of Armagh*, 2 *Str.* 837.

2. A *commendam capere* amounts to a presentation by the crown, but not a *commendam retinere*. *Rex v. Episc. Landaff*, 2 *Str.* 1011.

3. Where there are three patrons having right of presentation in their turns, the prerogative presentation, on promoting the incumbent to a bishoprick, shall not be considered as the turn of any of the patrons. *The Grocers' Company of London v. the Archbishop of Canterbury*, 3 *Wils.* 221.

(G. a) By Coparceners, Tenants in Common, or Joint-tenants.

1. **W**HERE the elder sister had conveyed her interest, it was held that her assignee was entitled to present first in turn. *Buller v. the Bishop of Exeter*, 1 *Ves.* 340.

2. Where there are joint-tenants trustees of an advowson, and a clerk is presented by a part, but the rest refuse their consent, the bishop may either refuse or accept the presentation. *Attorney-General v. Scott*, 1 *Ves.* 414.

3. Where there is an advowson in trustees, and they are directed by the trust to meet for the purpose of presenting a clerk within four months after the death of the incumbent, a meeting for that purpose after that time is valid. *Ibid.* S. C. *Ambl.* 83.



## (I. b. 3) Voidance, at what Time by Pluralities.

**I**T was agreed by the court that, as to lapse, the avoidance of the former benefice does not take place till induction to the second. *Bishop of Lincoln v. Wulferston*, 3 Burr. 1510. S. C. 1 Black. Rep. 490.

## (Y. b) Against what Persons being Patrons Lapse shall incur.

**T**HE dean and chapter of *Chichester* having a right to elect a canon residentiary, which is an office of trust, ecclesiastical and temporal, with freehold tenements annexed, and having neglected to make such election, the bishop claimed a right to present by lapse, by virtue of his visitatorial authority; but a prohibition was issued against him. The court were divided in opinion whether, if the bishop had appointed one to execute the office till the dean and chapter should make an election, such nomination *ad interim* would have been good. *Bishop of Chichester v. Herwood*, 1 Term Rep. 650.

## [G]

## Privilege.

97 Vin. 510.

## (B) Privilege. For what Causes.

1. **A** Party who has attended his cause all day in court, and in the evening retires to dine with his attorney and witnesses at a tavern in *Palace Yard*, is privileged from arrest, *causâ redeundi*. 2 Black. Rep. 1113.

2. If defendant returning from court to justify bail is arrested, he shall be discharged. *Barnes*, 378.

3. The court refused to discharge a person in custody by process of the sheriff's court, in a cause afterwards removed into *B. R.*, because he was arrested while attending commissioners of bankrupt to prove a debt. *Kinder v. Williams*, 4 Term Rep. 377. But *vide Kerney's case*, 1 Ask. 54. in which a contrary principle appears to have been held.

4. All persons who have relation to a cause which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process so to do, (such as bail,) are privileged from being arrested *eundo et redeundo*, provided their attendance be

be not for any unfair purpose, such as in the case of bail, an insolvent person's attempting to justify. *Merkins v. Smith*, 1 H. Black. 636.

5. Attorney waiting till judge comes to attend a summons, and the hour expires, if arrested, shall be discharged. *Barnes*, 378.

6. So the party to a cause is protected during his attendance on an arbitration under a rule of *nisi prius*. *Hutley's case* in the Exchequer, *Trin.* 1788.

7. Defendant taken in execution whilst attending a writ of inquiry as attorney, was discharged. *Barnes*, 200.

8. The drawer of a bill of exchange, which becomes due, and is paid by the acceptor, after the bankruptcy of the drawers, cannot be arrested by the acceptor during the time allowed them by stat. 5 G. 2. for attending the commissioners to be examined. *Darby v. Bangton*, 5 Term Rep. 209.

(D) What Persons shall have the Privilege.

17 Vin. 515.

1. THE king's servants are privileged from arrests, and if taken in execution, the court will discharge them on motion. *Bartlett v. Hebbes*, 5 Term Rep. 686.

2. This privilege extends not to capital crimes: thus defendant, appearing upon his recognizance, was arrested in court upon a new count, upon a new warrant, for treasonable practices. *Ren v. Kelly*, 1 Stra. 530.

3. An arrest, within the king's palace, by an officer of the palace court, of a person not of the household, against whom a writ has issued out of that court, though no leave to make the arrest has been obtained from the board of Green Cloth, good, and no indictment will lie against the officer making it. *Ren v. Stobbs*, 3 Term Rep. 735.

4. A volunteer is not privileged from arrests under an act privileging impressed men. *Turner v. Turner*, 1 Burr. 466.

5. English secretary to a foreign minister privileged from arrest, though formerly a trader, and now under very suspicious circumstances, *Triquet and others v. Bath*, 3 Burr. 1478. And vide 7 Ann. c. 12.

6. Ambassador's domestic servant, in order to entitle him to privilege, must shew himself to be in service at the time of the arrest. *Heathfield v. Chilton*, 4 Burr. 2015.

7. And it has been adjudged that a defendant claiming the benefit of the act 7 Ann. c. 12. as domestic servant to a public minister, must be really and *bonâ fide* his servant at the time of the arrest; and must clearly shew by affidavit the general nature of his service, the actual performance of it, and that he was not a trader or object of the bankrupt laws. Vide 2 Stra. 797. 2 Ld. Raym. 1524. 1 Wilf. 20. 78. 1 Burr. 401. 3 Burr. 1676.

8. Qu. Whether a gamekeeper to a peer be privileged from arrest. *Chester v. Upsdale*, B. R. 1 Wilf. 278. This privilege, extending

extending formerly to the servants of peers necessarily employed about their persons and estates, seems to have been taken away by the stat. 10 G. 3. c. 50. *Vide 5 Term Rep.* 687.

9. By the law and custom of parliament members of the House of Commons (stat. 10 G. 3. c. 50.) are privileged from arrest, not only during the actual sitting of parliament, but for a convenient time sufficient to enable them to come from and return to any part of the kingdom before the first meeting, and after the final dissolution of it; and also for forty days after every prorogation, and before the next appointed meeting, which is now, in effect, as long as the parliament exists, it being seldom prorogued for more than *four score* days at a time. 2 *Stra.* 985. 1 *Black. Com.* 165.

10. If an attorney or other officer of the King's Bench be arrested by process issuing out of the same court, he may move to be discharged on common bail. *Wheeler's case*, 1 *Will.* 298.

11. But if he be an attorney or officer of a different court, he must find special bail, and plead his privilege in abatement. *Snes v. Humphreys*, C. B., 1 *Will.* 306.

12. Bankrupts, having obtained their certificates, as they cannot be sued, are not liable to be arrested for debts contracted prior to their bankruptcy. Stat. 5 G. 2. c. 30. s. 7. 13. 2 *Stra.* 949. 1 *Atk.* 152.

13. *Insolvent debtors and fugitives*, discharged under insolvent acts, are not liable to be arrested. (see the stat. 37 G. 3. c. 112.) even on subsequent *promises*, for debts contracted prior to the times prescribed by the acts. 2 *Stra.* 1233. *Sed vide Drew v. Jefferies*, 2 *Burr.* 736. And see *Cowp.* 549.

37 Vin. 520. (G) Of the Chancery [and other Courts.] In what Cases it shall be granted.

1. **T**HIS day *Harrison*, who was deputy to Mr. *Marbham* the foreign opposer, was allowed his writ of privilege to exempt him from serving the office of constable. *Bunbury's Reports* p. 24. *Harrison's case*, June 17, 1718.

2. Officers of revenue ought to be sued in the Exchequer for what they do in the execution of their office. *Bunbury*, 34. 1718. *Beerholt v. Candy*.

*And the court of Exchequer will remove an action commenced in C. B. against an officer for seizure of a ship, though no information for the ship be yet filed. Ibid.*

*An information was tried, and a verdict for the defendant; the informer moved for a new trial, which was denied: an action was commenced in the Common Pleas against the officer for the seizure, and the court was moved, that it might be removed here, but denied; because the officer was now out of court, and could have no protection here. 1721, in notes, Bunbury, 35.*

3. The defendant's plea of privilege as an attorney of the court of King's Bench was received *per totam curiam*, after appearance by the defendant, and bail put in. *Bunbury's Reports* p. 113. 1742. *Upton v. Coward*.

4. Writ

4. Writ of privilege granted to the deputy of the usher of the Customs; but denied to the chief accountant to the commissioners for victualling the navy. *Bunbury*, 255. 1728. *Bishop v. Lloyd*.

5. Officer of customs seizes two cables, one whereof is only foreign, the court refused to remove the action of trespass from *B. R.* *Bunbury*, 306. 1731. *Barkley v. Walters*.

6. An action of trespass against a revenue officer, for his conduct in the execution of his office, may be removed from the court of Common Pleas into the office of pleas of the Court of Exchequer. 1 *Anstr.* 205. *Trin.* 33 G. 3. *Anon.*

*As to the privilege of the officers of the revenue of being sued in the Exchequer, ibid.*

7. A defendant arrested by a *quo minus*, while protected by the privilege of the court of Common Pleas as a suitor there, may be discharged by either court. 3 *Anstr.* 941. 37 G. 3. *Walker v. Webb*.

8. A party attending an arbitrator, under an order of the court of Chancery, is privileged from arrest. 3 *Ves. jun.* 350. 1797. *Moore v. Booth*.

9. The privilege of a bankrupt from arrests during his examination, extends to an attachment for not paying money under an award made a rule of court. 3 *Ves. jun.* 554. 1797. *Ex parte Parker*.

10. A detainer before a party could be discharged from an illegal arrest, as where he was returning from his examination under a commission of bankrupt against him, cannot be supported. 4 *Ves. jun.* 691. 1799. *Ex parte Hawkins*.

11. Plaintiff, in his return from attending a motion against him in a cause, was arrested and a detainer lodged against him in another action; he was discharged from both. The court examined the parties personally and not by affidavit. 5 *Ves. jun.* 1799. *Bromley v. Holland*.

(G. 2) Allowed. How.

27 Vin. 525.

1. **I**N general, where the defendant is entitled to privilege, as the arrest is irregular and unlawful, the court will discharge him upon motion, and not put him to the necessity of suing out a writ of privilege. 2 *Str.* 985. 5 *Term Rep.* 689. But *vide* 1 *Wils.* 278.

2. But where a man is arrested by process out of the courts of *Westminster*, it does not seem that justices of the peace, unless the arrest is made in the sessions, have power to discharge him. Thus, on *Tuesday* the 2d *November* 1781, application was made to the court of King's Bench for the discharge of one *Kelly*, who had been arrested under the following circumstances.—He had taken up his residence in the verge of the court, in order to exempt himself from arrest, some of the officers of which contrived that he should be carried to a magistrate out of the limits of his privilege upon

upon a peace warrant. To the charge exhibited against him before the justice Mr. *Kelly* gave bail, and was dismissed with a direction to the constable to conduct him unmolested back to the verge of the court. But, notwithstanding such direction, while returning, he was apprehended by a sheriff's officer, who imprisoned him on a civil process. Mr. *Kelly* applied to be discharged out of custody, on the ground that this arrest was illegal; but the court refused to grant the motion, declaring that the present case stood precisely on the same footing with an arrest within the verge of the court, without an order of the board of Green Cloth, and that the party must resort to his remedy against the officers for infringing the privileges of that board, but that they could not discharge him.

97 Vin. 536. (B) *Distringas*. *Distringas* upon Testatum at the Common Law.

1. **I**T is in the discretion of the court to put a defendant under terms, who moves to have the issues under several *distringas* restored to him on his appearance according to stat. 10 G. 3. c. 50. s. 4. *Cazalet v. Dubois*, 1 Bos. & Pul. 81.

2. Costs of issuing writs of *distringas* under stat. 10 G. 3. c. 50. to be paid before appearance, though no issues levied. *Martin v. Townshend and Sawbridge*, 5 Burr. 2725.

3. By the above-mentioned stat. 10 G. 3. c. 50. "for the further preventing delays of justice by reason of the privilege of parliament," it is enacted, "That the process of *distringas* is dilatory and expensive;" for remedy whereof it enacts (s. 4.) "That the court, out of which the writ proceeds, may order the issues levied from time to time to be sold, and the money arising thereby to be applied to pay such costs to the plaintiff as the said court shall think just, under all the circumstances, to order; and the surplus to be retained until the defendant shall have appeared, or other purpose of the writ be answered." With a proviso, that "when the purpose of the writ is answered, then the said issues shall be returned; or if sold, what shall remain of the money arising by such sale, shall be repaid to the party distressed upon."

4. The above-cited statute has been construed to extend to all writs of *distringas*, and not to be confined to such as concern privilege of parliament only. *Raban v. Plaistow*, 5 Burr. 2726.

5. Defendant, before the action commenced, quitted the kingdom, leaving his mother in possession of his house and goods; plaintiff having served a summons to appear at the house, distrained the goods to compel an appearance, and on an application to the court that the levy should be restored, the proceedings were holden regular. *Staines v. Johannot*, 1 *Bos. & Pul. Rep.* 200.

6. It is ordered, that in all writs of *distringas*, returnable on the last day of term, the plaintiff shall be at liberty at the rising of the court to move to increase issues on the *alias* or *pluries distringas*, to be issued thereupon on the following day, in case no appearance shall then have been entered. And also that in like cases where a *distringas* shall be returnable on the last day of term, and issues thereupon levied, the plaintiff shall be at liberty, at the rising of the court, to move for leave to sell such issues to pay the costs of such *distringas* or *distringas*. *Reg. Gen. C. P. T.* 38 G. 3. 1 *Bos. & Pul.* 312.

(G) At what Time Process may be executed.

17 Vin. 539.

1. FORMERLY a copy of the process must have been served on the defendant *before* the return day, but now it is holden that service, at any time after the rising of the court on the return day, is sufficient. 2 *Burr.* 812. 1 *Term Rep.* 192.

2. The *custos brevium* is to endorse on every writ on what day and at what time it is filed: *Reg. Gen. T.* 33 G. 3. 3 *Term Rep.* 787.

3. It is irregular if a *capias* be served after the date of the return, and if there be not 15 days between the *teste* and return. *Whale v. Fuller*, 1 *H. Bl.* 222. But if the defendant take the declaration out of the office, he thereby waves all preceding irregularity. *Ibid.*

4. If a defendant be arrested after the writ is returnable, the officer cannot legally detain him (though for the shortest time) until the writ be continued. *Loveridge v. Plaistow*, 2 *H. Bl.* 29.

5. Service of a *latitat* at eight o'clock in the evening of the return day is good, though the declaration be left in the office in the course of the same day. *Robertson v. Douglas*, 1 *Term Rep.* 192.

6. So, in the case of *Ward v. Wilkinson*, the court refused to set aside the proceedings, though the notice of declaration was not served till half after ten at night. 1 *Term Rep.* 192. (a).

7. Service of notice of declaration on a *Sunday* is bad, though the defendant accept it knowing it to be irregular. *Morgan v. Johnson*, 1 *H. Black.* 628.

8. A defendant must not be served with process whilst he is attending at any of the courts at *Westminster*. 2 *Sira.* 1094.

9. Service of mesne process on the return day is good in *C. B.* at well as in *B. R.* *Gen. R. P.* 8 G. 3. 2 *Wilf.* 372.

10. Where a writ is returnable on a *Sunday*, it must be executed at latest on the *Saturday*, and where a defendant in such case was

was arrested on Monday morning, and detained till the writ was renewed, the arrest was held illegal. *Loveridge v. Plaistow*, 2 H. Black. 29.

27 Vin. 540.

### (H) Who may execute it.

1. IN particular franchises and jurisdictions, the proper officer there should execute the process. *Stat. 5 G. 2. c. 27. s. 3.*

2. Service is good, though in a liberty, and not by a proper officer: but the party injured may bring his action. *Barnes*, 404.

3. Process directed to the sheriff of *Kent* served in the *Cinque Ports*, is bad; it should be *test. cap.* to the constable of *Dover Castle*. *Barnes*, 422.

4. In a county palatine, the sheriff acts not by virtue of an immediate and direct authority, but by virtue of a mandate from the officer to whom the writ is directed; but if the writ, in such case, be directed immediately to the sheriff, without such intervention, he is bound to execute it, and a bail bond taken on the arrest, is legal. *Jackson v. Hunter*, 6 Term Rep. 71.

5. Where the sheriff having directed a warrant to *A.* and all his other officers to arrest *B.*, *A.* afterwards inserted therein the name of *C.*, it was holden that the warrant was illegal, and the arrest by *C.* consequently void. *Housin v. Barrow*, 6 Term Rep. 122.

27 Vin. 541.

### (I) What shall be said a good Arrest in Law.

1. AN officer to whom a warrant is intended to be directed, cannot arrest the party before he has the warrant. If he do, the court will discharge the defendant out of custody. *Hall v. Roche*, 8 Term Rep. 187.

2. Whether the officer be not bound to produce the warrant to the party arrested, if it be demanded? *Ib.*

3. The officer cannot justify breaking open the window, or outward door; but if once in the house, he may break open inward doors. *Foster*, 319, 320.

4. Only the occupier and his family, whose ordinary residence is there have this privilege. The house of another is not the castle of a stranger. *Ibid.*

5. A warrant of the chief justice of *K. B.* to arrest a party "to the end that he may become bound, &c. to appear at the next session of oyer and terminer," &c. means the next session after the arrest, and not after the date of the warrant. Therefore the officer executing it may justify an arrest even after the lapse of several sessions subsequent to the date of the warrant. It is not necessary to renew such warrant every session, if not executed before. *Mayhew v. Parker*, 8 Term Rep. 110.

6. Where *A.* was arrested at the suit of *B.* and discharged, the sheriff not knowing that there was also a detainer in his office at the

the sabbath of C., and on the Sunday following he was arrested at C.'s suit, the court discharged him out of custody, considering the arrest on a Sunday as an original taking, or as a retaking after a voluntary escape; and in either case it was prohibited by the statute. *Barnes*, 373.

7. But after a negligent escape the defendant may be retaken on a Sunday, and that either by the officer upon a fresh pursuit, or by virtue of an escape warrant, for this is not an original taking, but the party is still in custody upon the old commitment. *Sir Wm. Moore's case*, 2 Lord Raym. 1028.

8. A peace officer may justify an arrest on a reasonable charge of felony, without a warrant, although it should afterwards appear that no felony had been committed; but a private individual cannot. *Samuel v. Payne*, 1 Dougl. 359.

9. A bailiff who has arrested a prisoner on *mesne process* may retake him before the return of the writ, though he voluntarily permitted the prisoner to escape immediately after the arrest. *Per Ashhurst J.*—The only difference between an arrest on *mesne process* and an execution is this, on the former the bailiff may permit the prisoner to go at large, provided he has him at the return of the writ; but in the latter case, if the bailiff voluntarily permit the prisoner to go at large, though only for a minute, he cannot afterwards retake him. *Atkison v. Mattison*, 2 Term Rep. 172.

10. If a party is arrested in another county by a bill of *Middlesex*, the proceedings will be set aside for irregularity. *Devinge v. Dalby*. 1 Dougl. 384. *Borman v. Bellamy*, S. P. 1 Term Rep. 187.

11. To make an arrest perfectly legal there ought in the first place to be a warrant for apprehension; as in the case of *William Power*, who was indicted for the murder of *John Wilkison*, as assistant to Mr. Parke, an headborough sent to take the said *W. Power* into custody for having been guilty of riotous behaviour, &c. When the judges *Wilson* and *Grose*, who were on the bench, concurred with Mr. J. Gould (who tried the prisoner) in opinion, that as the riot was over, and there was no authority from a justice of peace to seize *Power*, he was illegally arrested, and that, where a person, being deprived of his liberty illegally, does an act that causes the death of his assailant, in any manner whatever, certainly in law it reduces the offence to manslaughter. *O. B. Sess. September 1789*.

12. Bare words will not make an arrest, but if the bailiff touch the person it is an arrest, and the retreat a rescous. On a motion for an attachment against three persons for a rescous of a person taken in execution, it was objected that there had not been a legal arrest, as the bailiff had never touched the defendant. *Per curiam*—This is a good arrest: and if a bailiff, who has a process against one, say to him, when he is on horseback, or in a coach, "you are my prisoner, I have a writ against you," upon which he submits, turns back, or goes with him, though the bailiff never



touched him, yet it is an arrest, because he submitted to the process; but if instead of going with the bailiff, he had gone or fled from him, it could be no arrest, unless the bailiff had laid hold of him. *Horner v. Batten*, B. R. Hil. 12 G. 2. *Bull. Ni. Pri.* 62.

13. One who is convicted on a penal statute, cannot be apprehended on a *Sunday*, for non-payment of the forfeiture, for this is a civil proceeding. It is in the nature of a *fi. fa.* when on a return of *nulla bona*, the person is liable when first a warrant is issued to seize the goods of the defendant, and for want of a distress the person is taken. Under the act, however, of 29 Car. 2. c. 7. s. 6. no man can be arrested on *Sunday*, but for treason, felony, or a breach of the peace, and this is neither. *King v. Myer*, 1 Term Rep. 265.

14. A bailiff, in the execution of *mesne process*, may break open the door of a lodger's apartment, which is not to be considered as his outer door, and the street door being open, the officer has a right to force open the chamber door, the defendant being in the room, and refusing to open it. *Lee v. Ganfel*, 1 Cowp. 1.

## Pro Confesso.

17 Vin. 542.

(A) In what Cases a Bill may be taken *pro Confesso*.

1. AFTER goods, or a real estate, are seized upon a sequestration for want of an answer, the plaintiff may still proceed till he has got the bill taken *pro confesso*. 2 Atk. 21. 1739. *Davies v. Davies*.

2. Where there is an amended bill and no answer to it, the plaintiff is entitled to a decree *pro confesso*, abstracted from any proceedings in the original cause. *Ibid.* *Dubit.*

3. Whether the court can take a bill *pro confesso*, where an answer has been put in which is reported insufficient. *Quere.* *Ibid.*

4. If defendant demur, and the demurrer be over-ruled, and the defendant ordered to answer, if he refuses, the bill may be taken *pro confesso*. 1 Harr. Ch. Prac. 8 edit. 276.

5. If a Quaker refuse to put in his answer upon affirmation, the bill may be taken *pro confesso*. 1 Harr. 203. 8 edit.

6. Although a defendant has appeared and answered the original bill, if he cannot be found to be served with a subpoena to answer the bill of revivor, plaintiff must proceed under 5 G. 2. c. 25. to have the bill taken *pro confesso*. 2 Bro. Cha. Rep. 127. 1786. *Henderjon v. Meggs*.

7. After

## Pro Confesso.

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7. After an order that a bill be taken *pro confesso*, merely putting in an answer, is not sufficient to set aside the order. 2 *Bro. Cha. Rep.* 279. 1787. *Williams v. Thompson*.

8. Bill for an account taken *pro confesso* against surviving executor and devisee in trust. 3 *Ves. jun.* 22. 1795. *Shaw v. Wright*.

9. Information decreed to be taken *pro confesso* upon two insufficient answers. 3 *Ves. jun.* 209. 1796. *Attorney-General v. Young*.

10. Where there is only one defendant, after all the process of contempt for want of an answer, the bill may be ordered to be taken *pro confesso* upon motion. 3 *Ves. jun.* 372. 1797. *Seagrave v. Edwards*.

11. The Master of the Rolls refused to make an order upon the 5 G. 2. c. 25. for the purpose of having the bill taken *pro confesso*, without an affidavit, according to the 8th section, that the defendant had been in *England* within two years before the subpoena issued. 5 *Ves. jun.* 1. 1799. *Neale v. Morris*.

12. To obtain an order for taking the bill *pro confesso* under the *stat.* the affidavit must state that the defendant has been in *England* within two years before the subpoena. 5 *Ves. jun.* 118. *Bishop of Winchester v. Beaver*.

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## Prohibition.

[G]

(B) Of what Things or Actions, and for what Causes it lies (where) the Judges (before whom the Cause is brought) have not any Jurisdiction. 17 Vin. 548.

1. IN all cases where inferior courts assume a jurisdiction, or hold plea of a matter not properly cognizable by them, the party may stay their proceedings by prohibition, but such prohibition can only regularly be obtained by it appearing, on oath made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused; but no affidavit is necessary where on the face of the declaration the matter appears to be out of the jurisdiction. *Anon.* 1 *Peere Will.* 475.

2. A motion was made for a prohibition to be directed to the sheriff's court in *Bristol*, on suggestion that causes of action arising out of the jurisdiction of the sheriff's court ought not to be sued there; and this motion was made in behalf of the defendant, in

## Prohibition.

an action, before he had appeared to stay proceedings in the court, who proceeded to attach his goods in the hands of a garnishee; and the motion was opposed, because the defendant could not pray a prohibition on suggestion of a matter which he could not plead; and as here he could not plead this before performance, so he ought not to make such a motion before appearance. And *per Holt C. J.*—A man shall not plead to the jurisdiction until he appear; but if the original cause of action arose out of the jurisdiction of the court, the garnishee may plead it; but if it were debt on a simple contract, it is attachable where the person of the debtor is. *Cook v. License*, 1 *Lord Raym.* 346.

3. A prohibition will be granted to a court of appeal where it appears that they have no jurisdiction over the subject-matter, even after they have remitted the suit to the court below, and awarded costs against the appellant, and though the party applying for a prohibition appealed to that court. *Darby v. Cozens*, 1 *Term Rep.* 552.

4. Where the subject of a suit in an inferior court is within the jurisdiction of that court, though in the proceeding a matter be stated which is out of its jurisdiction, yet, unless it is going on to try such matter, a prohibition will not lie. *Dutens v. Robson*, 1 *H. Black.* 100.

5. Courts martial, courts of admiralty, and courts of prize, are all liable to the controlling authority of the courts at *Westminster*; the general ground of prohibition being an excess of jurisdiction when they assume a power in matters not within their cognizance, or act contrary to the rules of an act of parliament made to limit their authority. That they have decided wrong, or that there is error in their proceedings, may be ground of appeal or review, but not of prohibition, there being no ground for the interference of the courts at *Westminster* where the matter is clearly within the jurisdiction of such inferior courts. 2 *H. Black.* 100, 101. 107.

6. *Quere.* Whether the misinterpretation of a statute by an inferior court, the consideration of which arises incidentally in the course of a proceeding which is confessed to be within its jurisdiction, be a ground for a prohibition? Whether it be not rather a matter of appeal? But clearly in such a case a prohibition will not lie, unless it be made appear to the superior court, that the party applying for the prohibition, has, in the course of the proceedings in the inferior court, alleged a ground for a contrary interpretation of the statute on which he applies for the prohibition, and that inferior court has proceeded notwithstanding such allegation. 2 *H. Black.* 533.

7. Where the inferior court has cognizance of part of the charge, though not of the rest, the court of *B. R.* will not grant a prohibition. *Carlake v. Mapledoram*, 2 *Term Rep.* 473.

8. Prohibition shall go to the admiralty in a suit for the wages of the master of a ship. *Day v. Snelgrove*, 1 *Com. Rep.* 74.

9. If

9. If the defence stated on the proceedings below is such, as, if true, ousts the inferior court of its jurisdiction, (as where the party sets up a *modus* in answer to a suit for tithes) although there has been an interlocutory sentence in favour of the parson, and, on an appeal, that sentence has been confirmed, and costs awarded, the party sued may have a prohibition both to the original court, and to the court of appeal, to stay execution for the costs. *Darby v. Cozens*, 1 *Term Rep.* 552.

10. The court will grant a prohibition of the proctor or other officer of the spiritual court to sue there for his fees. *Pearson v. Campion*, 2 *Dougl.* 629.

11. The court of B. R. granted a prohibition to stay a suit in the spiritual court for breaking open a chest in the church, and taking away the title deeds to the advowson, because only an action of trespass or trover could be maintained in the temporal courts for the recovery thereof. *Gardner v. Parker*, 4 *Term Rep.* 351.

12. Prohibition lies, if executor libels for taking a thing without his consent, which defendant pretends was *donatio mortis causa*, for it may be tried by an action of trover. *Thompson v. Batty*, *Stra.* 777.

13. If there be a suit for removing a parish clerk, and punishing him for immoralities punishable by the temporal laws, there may be a prohibition as to all but the deprivation, but not as to that. *Townsend v. Thorpe*, 1 *Stra.* 776.

14. If a man libels for tithes in kind, and defendant insists on a *modus*, but permits the spiritual court to proceed to sentence, he is too late to apply for a prohibition. *Offey v. Whitehall*, *Mich.* 1717, in *Sc. Bunb.* 17.

15. If ecclesiastical court refuses a plea of parol agreement with the agent of the impropriator for purchase of the tithes, the corn being then severed, prohibition goes. *Chave v. Calmel*, 3 *Burr.* 1873.

16. If a *modus* is pleaded to a libel for tithes by the vicar, and the defendant applies for a prohibition, on a suggestion that the tithes are due to the impropriator, yet, if it appears that they are examining witnesses below to the *modus*, prohibition shall go. *Hood v. Hedden*, 3 *Bur.* 203.

17 Vin. 550.

## (C) Jurisdiction spiritual.

1. **T**HE general grounds of a prohibition to the ecclesiastical court are either a defect in the jurisdiction, or a defect in the mode of trial. If any fact be pleaded in the court below, and the parties are at issue, that court has no jurisdiction to try it, because it cannot proceed according to the rules of the common law, and in such case a prohibition lies. Or where the spiritual court has no original jurisdiction, a prohibition may be granted, even after sentence. But where it has jurisdiction, and gives a wrong judgment, it is the subject-matter of appeal, and not of prohibition. *Per Lord Kenyon. Leman v. Goulty*, 3 Term Rep. 4. And *Vide* 2 Burr. 813.

2. The spiritual court may compel the churchwardens to deliver in their account, but cannot decide on the propriety of the charges. Therefore if they take any step after the accounts are delivered in, it is an excess of jurisdiction, for which a prohibition will be granted, even after sentence. *Ibid.* 3 Term Rep. 4.

3. Where a *modus* is pleaded in an ecclesiastical court, a prohibition may be granted any time before final sentence. *Darby v. Cozens*, 1 Term Rep. 552.

4. Prohibition to the spiritual court to try proceedings for restoring a parish clerk, shall be granted: for the *offici* and *fees* are of temporal cognizance. *Tarrant v. Haxby*, 1 Burr. 367.

5. Prohibition to the spiritual court granted (even after affirmation upon appeal) against a decree for a *creditor*, who had cited an administratrix to bring in an inventory, and (it being brought in) had objected to it. The court held the *spiritual court* to have *no jurisdiction*. *Catchoide, Widow, &c. v. Ovington*, 3 Burr. 1922.

6. Prohibition denied after sentence, where the defendant below had set up several customs respecting *tithes*, but had submitted to trial. *Full v. Hutchins, Clerk*, 2 Cowp. 424.

7. Where a matter is properly triable at common law, *prohibition* lies *before* sentence. But if a party submit to trial, it is afterwards too late. *Ibid.*

8. Prohibition lies *after sentence*, if the ecclesiastical court has no cognizance of the cause, otherwise if there be only a *defect of trial*. *Ibid.*

9. In the vacation time, one may resort to the Chancery, and, upon a suggestion that the spiritual court has proceeded to grant administration to a wrong person, may have a prohibition out of that court into *B. R.* or *C. B.* *Per Holt C. J. Blackburn v. Davis*, 1 P. Wms. 43. 476.

10. Where the question is, whether the rector or vicar be entitled to tithes, no prohibition lies. *Drake v. Taylor*, 1 Stra. 87.

11. Prohibition to a suit in the spiritual court, for marrying without banns or licence, since the stat. 22 G. 2. c. 33. s. 8. by which it is made felony. *Campbell v. Aldrich, C. B.* 2 Wils. 79.

12. Where

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12. Where the right to tithes is admitted, and a question arises between the rector and vicar, to whom they are payable; that question is triable in the spiritual court, and consequently the common law courts will not grant a prohibition. *Chefman v. Hoby*, *Willes' Rep.* 680.

13. Whether or not the spiritual court has jurisdiction over a cause depends not on the parties being ecclesiastical persons, but on the nature of the question in dispute. *Ibid.*

14. Where there is a legacy to the executor, the spiritual court cannot entertain a suit for distribution of the surplus among the next of kin under the statute. *Hatten v. Hatten*, 2 *Stra.* 865. *Edwards v. Freeman*, 2 *P. Wms.* 441.

## (G) For Seats in the Church.

27 Vin. 579.

1. IF one has a prescription to have a seat in a church, and the seats are pulled down without his consent, and new ones built by the ordinary on part of the place where the old one was, though he have as much seat as he had before, only not in the same place, it is illegal, and, if the spiritual court interpose, prohibition lies. *Archer v. Sweetnam*, *Hil.* 11 G. 1.

2. If there are reciprocal prescriptions to a seat in a church, prohibition lies; for they adjudge one to be good. *Paxton v. Knight*, 1 *Burr.* 312.

3. One was sued in the spiritual court for disturbing a person in his seat in the church, and now suggested for a prohibition that he purchased an ancient house with this seat belonging to it, to him and his heirs, which was pleaded below. *Per cur.* This is enough to shew the temporal right is in question; and a prohibition was awarded. *Wicker v. Chesham*, 1 *Wils.* 17.

## (K) Jurisdiction. Reparation. Ornaments.

17 Vin. 580.

1. PROHIBITION shall not be granted where it will not be material. As to stop the prerogative court from proceeding to grant a faculty for an organ in the church. *Butterworth v. Walker*, 3 *Burr.* 1689.

2. The consent of the parish is not necessary to the ordinary on the ecclesiastical court's ordering an organ to be erected in the church. But the parish cannot be charged with the expence, nor with the repair, or with any new ornaments, without their consent. *Ibid.*

3. No prohibition lies to a suit of the ordinary to deface ornaments (as arms) set up in a church without his consent. *Palmer v. Bishop of Exon*, 2 *Stra.* 1071.

4. The ordinary cannot punish a single trespass committed on the body of the church, which does not hinder the service. *Binsfield v. Collins*, *Bunb.* 229.

## Prohibition.

5. If in a dispute before the ordinary about erecting a monument, one appeals to the arches, such appeal lies, and no prohibition shall go. *Cart v. Marfb, Andr. 69.*

6. A prohibition was granted on a libel to charge a man to the repair of the church in respect of a light-house, after sentence and an appeal to the delegates. *Rebow v. Bickerton, in Sc. T. 1721. Bunb. 81.*

7. Prohibition was moved for to the consistory court of the Bishop of *Exeter*, where the party was libelled against for a rate assessed by the churchwardens by custom for repair of the church, as well the chancel as the nave of the church. And resolved, 1. That the parishioners and not the churchwardens ought to assess the rate. 2. That the parson ought to repair the chancel, and not the parishioners, but that the parishioners ought to repair the nave of the church. And, by *Holt, C. J.*, by the canon law the parson ought to repair the whole; but by the custom of *England*, the parson shall repair the chancel, and the parishioners the nave of the church. And by the custom of *London*, the parishioners shall repair the chancel also. But *Rokeby, J.* was of opinion, that the parishioners ought to contribute to the charge of the ornaments of the chancel; but *Holt* doubted of that. Then it was moved, that a prohibition should be granted only *quoad* the suit for the rate for the chancel: but resolved, that the prohibition shall be for the whole, because it is but one rate and entire; but if a man libel for two distinct things, the one of which is of ecclesiastical cognizance, and the other not, a prohibition shall be granted, *quoad* that which is of temporal cognizance, and they of the court christian shall proceed for the other. Therefore in the principal case a prohibition was granted. *Pense v. Prouse, 1 Ld. Raym. 59.*

8. Prohibition does not lie to a suit in the ecclesiastical court against a Quaker for repairs of the church on stat. 7 & 8 W. 3. c. 34. though the act gives a remedy before justices of the peace, for the old remedy is not taken away: nor in the case of small tithes under stat. 7 & 8 W. 3. c. 6. *Fert. 347.*

27 Vin. 588. (N) *What shall be said a Defamation spiritual to maintain a Suit in the Ecclesiastical Court.*

1. A Prohibition was moved for to a suit in the spiritual court for calling a woman *jilt and strumpet*; and denied, for *per cur.*, they are charges of incontinence, and the signification of them well known. *Ferguson v. Cuthbert, Stra. 822.*

2. Libel in the spiritual court for these words, "*Moll Winter is a whore and a common whore, and pleyer in a bawdy-house.*" Prohibition moved for and refused after sentence. *Head v. Winter.*

3. If motion and rule to shew cause be before sentence given below for calling a woman whore, in *London*, but rule not served till

till after sentence, prohibition shall not go. *Selby v. York, Trin. 10 & 11 G. 2.* Note, This is said to have been ruled on another point also, viz. That in the recital of the libel in the suggestion, the words are said to be spoken in the parish of *Saint B. in London, or in parts near adjacent*; if it had appeared by the proceedings or by affidavit, (which was now too late) to be in *London*, prohibition ought to stand, for the spiritual judge had no jurisdiction. *Sarby and Wife v. York, Andr. 7. (a).*

(a) N. B.  
This is com-

trary to the case of *Argyle v. Hunt, 1 Stra. 187.* and *Cook v. Wingfield, Ibid. 555.* where prohibition was denied for the word *where*, though it appeared on the face of the proceedings to be spoken in *London*.

4. To support prohibition to the consistory court of *London* for calling *whore* in *London*, there must be affidavit of custom, and that the word was spoken there. *Theyer v. Eastwick, 4 Burr. 2032.*

5. When scandalous words are spoken of the function of a spiritual person a prohibition shall not go. *Anon. 1 Com. 25.*

6. Words which do not directly charge the party with being a whore are not such whereon the jurisdiction of the spiritual court ought to be disallowed. *Steward v. Allen, 1 Com. 235.*

7. Prohibition shall be granted to the spiritual court where a libel is for words spoken of a clergyman which are actionable at common law. *Hall v. Downes, in C. B. 2 Com. 308.*

8. No prohibition lies for the words, *You are a bawd*, for it is not a charge of keeping a *bawdy-house*, which is punishable as a temporal offence. *Lockey v. Dangerfield, 2 Stra. 1099.*

9. These words spoken of a woman, "I have kept her company these seven years; she *bath* given me the bad disorder, and three or four other gentlemen," are not actionable, because they may refer to a time past. And no prohibition will be granted to a spiritual court in which a sentence has been pronounced on a libel for this charge, *Carlake v. Mapledoram, 2 Term Rep. 473.*

10. Where prohibition is prayed for a matter not appearing on the face of the proceedings to be out of the jurisdiction, the suggestion must be verified by affidavit: therefore though there is a custom, and that custom verified by affidavit, that *whore*, and calling a woman *whore*, is punishable at *Bristol* by the common law, yet if there is not an affidavit that the words were spoken in *Bristol*, prohibition shall not go. *Hinds v. Thompson, Andr. 299. Driver v. Driver, ibid. 304.*

11. Yet a rule was granted to shew cause, why prohibition should not go for calling a woman *strumpet* in *Bristol*, though there was no affidavit of the custom. *Power v. Shaw, 1 Wils. 62.*



18 Vin. 38. (D. a. 2) Proceedings. What must be done in order to get a Prohibition.

1. **T**HERE must be an affidavit that the copy of the libel is a true one. *Barnes*, 427.

2. If a civilian cannot be got to argue for it, none shall be heard against it. *Barnes*, 428.

3. If the ecclesiastical court clearly appears to have jurisdiction, and have pronounced sentence, the court will not even grant a rule to shew cause. *Symes v. Symes*, 2 *Burr.* 813.

4. Where there is no *defectus jurisdictionis*, but only *triationis*, the defendant must plead it below, and have his plea disallowed, before he can be entitled to a prohibition. *Buller's N. P.* 219.

5. Where a person is sued in the ecclesiastical court for a seat in the church, if he would obtain a prohibition and oust the ordinary jurisdiction, he must shew such a legal title as can be tried in the ecclesiastical court, which can only be by prescription; and prescription can in such case be no otherwise proved than by shewing repairs. *Buller's N. P.* 219.

6. Where the matter suggested for a prohibition appears, on the face of the libel, to be out of the jurisdiction of the inferior court, an affidavit of the truth of the suggestion is never insisted on; but if it does not appear on the face of the libel, or if a prohibition is moved for, for more than appears on the face of the libel, to be out of their jurisdiction, there ought to be an affidavit. 1 *P. Wms.* 477. *Andr.* 304.

7. On moving for a prohibition to the spiritual court for refusing a plea, the party ought to offer an affidavit of the truth of the facts in the plea. *Burdett v. Newell*, 2 *Ld. Raym.* 1211.

18 Vin. 44. (F. a. 2) Writs, Declarations, &c. in Prohibitions, and Rules concerning them.

1. **U**PON shewing cause against a prohibition, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition: he tendered a declaration, but the defendant refused it, and he applied to stay proceedings, as being willing to submit. The other insisted he had a right to go on, and so get at the costs of the motion, which he could not otherwise have. But the court stayed the proceedings without costs; saying, the direction to declare was in favour of the defendant, who might waive it. *Gegg v. Jones*, 2 *Stra.* 1149.

2. Leave to declare in prohibition will be granted only when the court inclines to prohibit, not when it inclines to the contrary. *Le Caux v. Eden*, 2 *Dougl.* 620.

3. The party applying for a prohibition has no right to insist on declaring, when the court is satisfied that his application is ground-  
less,

less, but the *defendant* in prohibition may, when the opinion of the court is against him. 1 *Burr.* 198.

4. Where an issue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they shall give no more than 1*s.* damages, for it is in nature of an issue to inform the conscience of the court; but after he has had judgment, *quod flet prohibitio*, he may bring his action upon the case, and recover the damages he has sustained. *Carter v. Leeds*, Mich. 2 G. 2. *Buller N. P.* 219.

5. Prescription for a seat in a church. In declaration in prohibition the plaintiff ought regularly to set out a custom of repairing, (which is requisite to support the prescription,) but if he do not, if the defendant does not demur, but goes to trial, it will be aided by the verdict, for the plaintiff ought not to have a verdict unless he prove a custom to repair. *Stedman v. Hay*, 1 *Comyns*, 366.

6. If a *modus* be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant; but if any *modus* be found, though different from that laid, there is a ground for the court to refuse a consultation. *Brook v. Richardson*, 1 *Term Rep.* 427.

7. If the issue lies on the plaintiff, who does not appear at the trial, he must be called and nonsuited; and if defendant put in his record, enter into his proof, has a verdict and judgment, it is irregular, and shall be set aside. *Gardner v. Davis*, 1 *Wils.* 300.

(O. a. 2) Contempts to Prohibitions. Punished how 18 Vin. 52.  
and where, and Pleadings.

**I**N prohibition, the contempt is but form, and the jury need not give any verdict about it. *Stratford v. Neale*, 1 *Stra.* 482.

(P. a) Consultation. In what Cases it shall be 18 Vin. 60.  
granted.

1. **T**HE marriage of a man with his first wife's mother's sister is within the Levitical degree, and prohibited, and a consultation awarded. *Bunb.* 145.

2. If prohibition is granted on suggestion of a custom, and on issue joined the custom is found, but the court, on motion in arrest of judgment, find the custom ill, a consultation shall go. *Dent v. Coates*, 2 *Stra.* 1145.

3. If plaintiff in prohibition declares, that there is a custom for the occupiers of his tenement to pay 5*s.* in lieu of tithe of corn and hay, which *modus* the parson has always accepted, and verdict for plaintiff, there shall be no consultation; for the *modus* is found, though it is described as a custom, when strictly it should have been a prescription. *Sharp v. Lowther*, 1. 9 G. 2.

4. If

## Prohibition.

4. If a *modus* be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant, who is entitled to costs; but if any *modus* be found, though different from that laid, that is a ground for the court to refuse a consultation, *Brook v. Richardson*, 1 Term Rep. 427.

5. In cases of title and such sort of matters, where many things are in controversy, it is very frequent to order the prohibition to stand as to part, and a consultation to go as to the other part. *Bull. Ni. Pri.* 218.

## Property.

28 Vin. 66.

(A) *In what Persons*, may be, or shall be said to be.

**A**N action of trover cannot be maintained by a tenant in tail, expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon, and was severed from the estate; for the property of them is not in him, but in the tenant for life. *Pyne v. Dor*, 1 Term Rep. 55.

(C) *Divested or preserved, by what and when.*

**I**F money and an horse are given in exchange for another horse warranted sound, but which was unsound at the time. Trover will not lie for the horse given in exchange, because the property is altered. *Power v. Wells*, Cowp. 818. *Dougl.* 24. n. S. C.

(D) *Property gained, altered, or transferred, by what Act, &c.*

1. **A.** Sends goods to *B.*, who was at the time indebted to him for other goods; *B.*, seeing that his affairs were in a declining situation, sent them to *C.*, who had orders to deliver them to *A.* Afterwards, June the 4th, *B.* became bankrupt; June the 6th he wrote to *A.*, stating that his affairs being in a declining situation, he had left the goods with *C.* for him. June 9th a commission issued against *B.*, and on the 13th *A.* received the letter, which was the first notice he had of the delivery of the goods to *C.*, and as soon as possible he signified his consent to receive them. The question was, Whether these goods were not absolutely vested in *A.* by the delivery to *C.* before the agreement of *A.*; since otherwise the act of bankruptcy intervening would prevent the property from vesting in him? And held, that the contract

tract did not stand open until agreement, but is complete unless there was an actual disagreement. *Atkins v. Barwick*, 1 *Stra.* 165. 10 *Mod.* 432. *Fort.* 353.

2. But in *Harman & al. v. Fisher, Cowp.* 117. where a trader in contemplation of absconding, inclosed in a letter certain bills to *F.*, a particular creditor, in discharge of his debt, saying, "he has the honour to shew him that preference he conceives is his due;" and this was done without the privity of *F.*, and followed by an act of bankruptcy before the notes could possibly be delivered. *Per cur.*—The essential motive being to give a preference, and the act itself incomplete, is clearly void, though in favour of a very meritorious creditor. And *per Lord Mansfield*—The judgment in *Atkins v. Barwick* is right, but the reasons wrong. The true ground was, that the trader honestly refused to accept the goods, and returned them. *Salte v. Field*, 5 *Term Rep.* 211. *Vide also Hague v. Rolleston*, 4 *Burr.* 2174. and *Alderson v. Temple*, *lb.* 2238. where the contract being held incomplete for want of the consent of the person to whom the goods and bills were sent, and being done in contemplation of bankruptcy, the transaction was held fraudulent and void.

3. If goods are *bonâ fide* sold by the factor at sea (as they may be where no other delivery can be given) it will be good, notwithstanding the statute 21 *Jac.* 1. c. 19., and the vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered. *Per Lord Mansfield* in *Wright v. Campbell*, 4 *Burr.* 2046.

4. If goods are consigned to *A.* to sell them for the consignor as factor, who pretending that the goods are his own property assigns the bill of lading indorsed to him to *B.* for a valuable consideration and without notice, and then becomes insolvent; and afterwards the consignor indorses the bill of lading remaining in his possession to *C.* before the goods arrive, and they are delivered to him; *B.* may recover them in an action of trover. *Wright v. Campbell*, *Burr.* 2046. *Sed qu.* for a new trial was there granted on the ground of fraud, and *vide* the cases subsequent.

5. Where several bills of lading have been signed of different imports, no reference is to be had to the time when they were signed by the captain; but the person who first gets one of them by a legal title from the owner or shipper has a right to the consignment. *Caldwell & al. v. Ball*, 1 *Term Rep.* 205.

6. Where a merchant consigns goods, and the consignee becomes insolvent before they get into his hands, the consignor may stop them *in transitu*. *Snee v. Prescott*, 1 *Atk.* 245. *Birket v. Jennings*, cited *Cowp.* 296. *Lickbarrow & al. v. Mason*, 2 *Term Rep.* 63. S. P.

7. But if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is divested, for the assignment of the bill of lading transfers the property in the cargo. *Ibid.* But this judgment was reversed in the Exchequer Chamber. 1 *H. Black. Rep.*

357. On appeal to the House of Lords a *venire de novo* was directed.

(G) Gained, altered, or transferred, by Operation of Law.

THE plaintiff recovered in trover against the captain for yarn consigned to him. The captain obtaining an injunction on shewing the goods were delivered to the defendant, the plaintiff brought an action against him, and held him to bail. And the court discharged him on common bail, for by the former recovery the property vested in the captain, the plaintiff having damages in lieu thereof, and therefore in this action he could not say the goods were his. *Adams v. Broughton*, 2 *Str.* 1078. *Andr.* 18.

*Note.* Vid. S. P. this tit. 18 Vin. (G) note to pl. 3.

(I) Vests. At what Time.

THE indorsement and delivery of a bill of lading to a creditor *prima facie* conveys the whole property in the goods from the time of its delivery. *Hibbert & al. v. Carter*, 1 *Term Rep.* 745.

## Purchasor.

18 Vin. 111.

(A) Purchasor. Who.

1. AN heir shall take by purchase under a devise altering the limitation of the estate. 1 *Raym.* 728. *Emerson v. Inchbird*. If the ancestor devise his estate to his heir at law by will, with other limitations, or in any other shape than the course of descents would direct, such heir shall take by purchase. *Cro. Eliz.* 431.

2. But if a man seised in fee devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it, he shall be adjudged to take by descent, even though it be charged with incumbrances, this being for the benefit of creditors and others who have demands on the estate of the ancestor. 1 *Roll. Abr.* 626. 1 *Salk.* 241. 1 *Ld. Raym.* 728.

3. In marriage articles the issue to be considered as purchasers. 1 *P. Wms.* 145. 291.

4. *A.* enters into partnership in 5ths, with three others for 21 years, for digging mines in *A.*'s land; *A.* to have two fifths, and also in consideration of his ownership of the land, to have a tenth more out of the share of the other partners. Pursuant to the articles they searched for the mines, and after two years time and the expence of about 120*l.* they discovered a valuable mine, and worked it for about three months, and then *A.* dies, and his widow sets up a voluntary settlement made after marriage. The court inclined that the parties were *as purchasors*, and that the voluntary settlement should not stand against them. 2 *Vern.* 326.

5. A papist cannot take a freehold or leasehold estate by will, because taking by will is taking by purchase, and by the express words of the statute 11 & 12 *W.* 3. c. 4. a papist is disabled taking by purchase; also terms for years are expressly mentioned in the statute. 3 *P. Wms.* 46. *Davers v. Dewes*, *Trin.* 1730.

(B) Favoured. In what Cases.

18 Vin. 112

1. THE court will not compel a purchasor under a decree to accept a doubtful title. 2 *P. Wms.* 202. 1721. *Marlow v. Smith.*

2. One articles to buy land, and the title is under a will not proved in equity against the heir; yet in some cases equity will compel the purchasor to accept the title. 3 *P. Wms.* 190. 1733. *Colton v. Wilson.*

3. Though a purchasor did not know of an incumbrance before he paid his money, yet as he knew it before the deed was executed, it affects him with notice. 1 *Atk.* 384. 1739. *Wigg v. Wigg.*

4. A man purchasing for a valuable consideration, with notice of a voluntary settlement, from a person who bought without notice, shall shelter himself under the first purchasor. 1 *Atk.* 571. 1738. *Brandlyn v. Ord.*

5. A man cannot defend himself as a purchasor for a valuable consideration under articles only. *Ibid.*

6. Where a purchasor has given a full value for an estate, the mistake or ignorance of some of the parties to a conveyance of their claim under a marriage settlement, shall not turn to the prejudice of a fair purchasor. 2 *Atk.* 8. 1737. *Malden v. Menill.*

7. A purchasor with notice himself from a person who bought without notice, may shelter himself under the first purchase. 2 *Atk.* 242. 1741. *Lowther v. Charlton.*

8. Purchasor of an equitable title to a rent charge, must try it at law against the owner of the land claiming in contradiction thereto. 1 *Ves.* 392. 1750. *Whitfield v. Fauisset.*

9. A purchasor may protect himself against dower, by having got an assignment of a term. *Ambl.* 6. 1741. *Swannock v. Lifford.*

10. Put-

## Purchasor.

10. Purchasor for a valuable consideration without notice, by taking an assignment of a term, may protect himself from mesne incumbrances. *Ambl.* 282. 1755. *Willoughby v. Willoughby*.

11. It is no objection on the part of a purchasor of land sold by a Master, that more land is sold than is necessary for the purposes of the testator's will. 2 *Bro. Cha. Rep.* 248. 1787. *Lutwick v. Winford*.

12. Money having been paid in as earnest at a sale of an estate, and ordered to be laid out in the funds in part payment of the purchase money, the vendor must abide by the rise or fall of the funds. 3 *Bro. Cha. Rep.* 49. 1790. *Poole v. Rudd*.

13. The court will not make a purchasor appoint a clerk in court, which is necessary only where the party is to appear. 1 *Ves. jun.* 94. 1790. *Child v. Lord Abingdon*.

14. Purchasor held not entitled to a conveyance of part, though answering the general description in the advertisement of sale, as it was not in the contemplation of either party at the time of the purchase or conveyance, the purchasor having been referred to a more particular description, which did not include that part, and the surrender having been made according to that, and from his own instructions. 1 *Ves. jun.* 210. 1790. *Calverley v. Williams*.

15. If one party thought he had purchased *bonâ fide* part of an estate, which the other thought he had not sold, it is a ground to set aside the contract: if both understood the whole was to be conveyed, it must be conveyed; otherwise if neither understood so. *Ibid.*

16. A purchasor is not to be compelled to take an equitable estate. 2 *Ves. jun.* 100. 1795. *Abel v. Heatcote*.

17. Purchasor justified in taking a fair objection, though over-ruled. 4 *Ves. jun.* 631. 1799. *Cox v. Chamberlain*.

18. Query, Whether a purchasor under a power to revoke uses, substituting other estates of equal value, is not bound to shew the value of the substituted estates. *Ibid.* 638.

19. A purchasor not compelled to take a doubtful title, nor will a case be directed without his consent: the court also hesitated upon giving sanction to a title founded on the destruction of contingent remainders by the tenant for life, there being no trustees to support them. 5 *Ves. jun.* 647. 1800. *Roake v. Kidd*.

### 18Vin. 115. (C) Favoured. Plea of being a Purchasor for a valuable Consideration.

1. **W**HATEVER is sufficient to put a party on inquiry is good notice in equity to that party. 1 *Atk.* 490. 1739. *Smith v. Law*.

2. *A.* devises the estate in question to *B.* in tail, remainder to *C.* in fee; bill by the heir of the body of *B.* for deeds and writings, and possession: defendant pleads that he is a purchasor for a valuable consideration from *C.* without notice of plaintiff's title: where

where defendant claims under a conveyance, in which there is an estate tail prior to the estate under which he purchased, it is incumbent on him to see if that estate be spent. 1 *Atk.* 522. 1736. *Kelsall v. Bennett.*

3. Where by a transaction, foreign to the business in hand, a counsel or attorney employed to look over the title has notice, this shall not affect the purchasor. 2 *Atk.* 242. 1741. *Lowther v. Carlton.*

4. Plaintiff, a judgment creditor upon an estate in *Middlesex*, prays to be let in upon it preferably to the defendant, a mortgagee of the same estate, on a suggestion he had notice of the judgment before the mortgage was executed; the judgment was entered on the 12th *March* 1733, but not registered till the 12th *June* 1735; the mortgage was made the 24th *May* 1735, and registered *June* 2d 1735, there being only a defendant's confession of notice proved, in direct contradiction to his answer, and contrary to a positive act of parliament made to prevent perjury: the bill, so far as it sought to postpone defendant's mortgage, was dismissed with costs. 2 *Atk.* 275. *Hine v. Dodd.* *March* 1741.

5. Denying notice of the plaintiff's title at the time of the execution of the deed, or payment of the consideration money, is not sufficient: notice must be denied at or before the execution. 2 *Atk.* 397. 1742. *Fitzgerald v. Burk.*

6. To be a *bonâ fide* possessor is where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title. 3 *Atk.* 134. *Dormer v. Fortescue.* *April* 1734.

7. A purchasor if he denies notice, need only set forth the purchase deed, and plead his purchase in bar to the discovery of the title deeds. 3 *Atk.* 302. *Aston v. Aston.* *Hil.* 1745.

8. To a bill for possession, a purchase for a valuable consideration was pleaded, and that the money is *bonâ fide* secured to be paid: the defendant having notice before payment, may never pay. Plea over-ruled. 3 *Atk.* 304. 1745. *Hardingham v. Nichols.*

9. Denying notice as to himself only, is a negative pregnant that there was notice to his agent. 3 *Atk.* 650. 1748. *Le Neve v. Le Neve.*

10. Where the bill charges particular acts of notice, the defendant's denial of notice generally will not do. 3 *Atk.* 815. 1754. *Radford v. Wilson.*

11. Purchase for a valuable consideration held a good defence, though the consideration was much less than the real value. *Amb.* 764. 1766. *Bullock v. Sadler.*

12. Mortgagee may protect himself from discovering his title deed, if he denies notice. 2 *Ves.* 450. 1752. *Senbouse v. Earl.*

13. But special charges are to be denied as well as notice in general. *Ibid.*

14. Assignee of a mortgagee through assignments from persons not having notice of a defect in the title, not bound to discover



cover whether he had personal notice. 2 *Bro. Cha. Rep.* 66. 1786. *Sweet v. Southgate.*

15. The court will not take the least step against a purchasor for a valuable consideration without notice, not even to perpetuate testimony against him. 2 *Ves. jun.* 1794. *Jerrard v. Sanders.*

18 Vin. 118.

### (D) Affected. In what Cases.

1. **W**HERE land is ordered to be sold, and the money to be part of the personal estate, the purchasor is not bound to see to the application of the money. *Smith v. Guyon*, 1 *Brown's Rep.* 186.

2. In *Gebb v. Abbott*, Lord Chancellor said, where debts and legacies are charged on lands, the purchasor will hold free from the claims of the legatees, for not being bound to see to the discharge of the debts, he cannot be expected to see to the discharge of the legacies, which cannot be paid till after the debts. *Ibid.* (notes).

3. In the case of *Beynon v. Gollins*, (reported on a different point 2 *Bro. Rep.* 323.) the bill was dismissed as to the purchasors, with costs, they not being bound, under the charge, to see to the application of the purchase-money.

4. If debts are particularly specified the purchasor must see to the payment; but if more is sold than is sufficient, he is not obliged to enter into the account. *Spalding v. Spalmer*, 1 *Vern.* 301. *Vide* also *Ithell v. Beane*, 1 *Ves.* 215. and *Rogers v. Skillee*, *Ambler*, 188.

5. Where the first trust is for payment of debts, the purchasor is not bound to look to the application of the purchase-money. *Williamson v. Curtis*, 3 *Bro. Rep.* 96.

6. Where there is a purchase from executors and long possession, even under suspicious circumstances of fraud, the court will not relieve. *Andrews v. Wrigley*, 4 *ibid.* 125.

7. If a power be not pursued; there shall be relief in equity in behalf of a purchasor. *Per Treby*, 3 *Ca. Ch.* 89.

8. If there is a trust for the payment of debts generally, a purchasor shall not be affected, though he has notice. 1 *Vern.* 260.

9. But if the trust be for payment of debts mentioned in the schedule, a purchasor ought to apply the whole money paid by him to the debts, otherwise he shall be affected by the debts not discharged. 1 *Vern.* 303. 260. *Lloyd v. Baldwin*, 1 *Ves.* 173. *Vide* *Ambler*, 188, 9. 1 *Brownl.* 186.

10. So, if an act of parliament enables a tenant for life to raise money for rebuilding and stocking a printing-office, burnt down by fire, the mortgagee who advances money upon this security shall be affected, if the monies advanced are not applied to this particular purpose. 2 *Vern.* 6.

11. If the purchasor of lands in *Middlesex* knows they are charged with an annuity, he shall pay it, though the grant was not registered according to 7 *Ann. c. 20. Cheval v. Nichols*, 1 *Str.* 664.

12. If a man after marriage, in consideration of 100*l.* paid by his wife's mother, settles 100*l. per ann.* on himself for life, remainder to his son, &c. and his mother joins in the conveyance, and thirteen years after he mortgages, the mortgagee shall not foreclose. *Jones v. Marsh*, N. 8 G. 2.

13. A purchasor for a full consideration shall not be prejudiced by the mistake or ignorance of some of the parties to the conveyance of their claim under a marriage settlement. *Malden v. Merril*, 2 *Atk.* 8.

14. A purchasor without notice of a prior incumbrance shall not be impeached or prejudiced by it in equity. *Eq. Abr.* 333.

15. Nor discover his title, nor lose any advantage that he has by law. *Ibid.*

16. Defendant stating by answer a purchase for valuable consideration, shall not be compelled to answer farther. *Ferrard v. Saunders*, 2 *Ves. jun.* 454.

17. A purchasor shall have the benefit of an old mortgage assigned to him, though nothing is due upon it. *R. 2 Vern.* 159.

18. A purchasor of an estate after it has been in controversy in this court, on filing his supplemental bill, comes here *pro bono et malo*, and is liable to all costs from the beginning to the end of the suit. 1 *Atk.* 572. 1739. *Anon.*

19. An heir at law is as much at liberty to invalidate a will as the devisees to support it, and such a suit is to all intents a *lis pendens*. 2 *Atk.* 174. 1741. *Garth v. Ward.*

20. If an heir conveys an estate to a stranger whilst there is a suit for establishing a will, and it is afterwards established, the grantee of the heir is bound. *Ibid.*

21. If during a suit to redeem, the mortgagor assigns the equity of redemption, and there is a decree against him, the assignee is bound by it. *Ibid.*

22. If an heir at law in a suit to establish a will prevails against it, he shall have the benefit of the evidence in that cause against a purchasor *pendente lite*. *Ibid.* 1741.

23. The register act is notice to every body, and the meaning was to prevent parol proof of notice. 2 *Atk.* 275. 1741. *Hine v. Dodd.*

24. It is only in cases of fraud the court has broken in upon the act, though one incumbrance was registered before the other. *Ibid.*

25. Clear notice is a proper ground of relief; but suspicious notice, though a strong one, will not justify the court in breaking in upon the act of parliament. *Ibid.*

26. If the purchasor under a private contract does not pay the purchase-money at the time fixed, he will be chargeable with interest: as he must bear any loss, so likewise will he be entitled to

any profits which may happen to the estate. 2 *Atk.* 490. 1742. *Day v. Barber.*

27. If a person will purchase with notice of another's title, giving a valuable consideration will not avail. 3 *Atk.* 238. 1745. *Mead. v. Lord Orrery.*

28. Whoever takes from an executor must do it with notice of a will, and if the doctrine were to prevail of notice to an assignee of an executor, it would hold in every will, and none would dare to purchase or take an assignment from an executor. 3 *Atk.* 238. 1745. *Mead v. Lord Orrery.*

29. A *lis pendens* cannot affect any particular person with fraud, unless he has a special notice of the title in dispute there. *Ibid.* 243.

30. A decree is not an implied notice to a purchaser after the cause is ended: but it is the pendency of the suit which creates the notice. 3 *Atk.* 392. 1746. *Worsley v. Earl Scarborough.*

31. Notice to an agent or counsel who was employed in the business by another person, and at another time, is no notice to a client who employs him afterwards. *Ibid.*

32. Notice to an agent, as well as personal notice, will affect the party, and the deposition of the agent will be allowed to be read. 1 *Ves.* 62. 1747. *Maddox v. Maddox.*

33. Though the register act vests the legal estate according to the prior registry, yet is it left open to all equity; and notice even to an agent of a prior purchase not registered, will affect a subsequent purchase though registered. 1 *Ves.* 67. 1747. *Le Neve v. Le Neve.*

34. Where notice should be given of the issuing of a commission for an inquest. 1 *Ves.* 269. 1749. *K. v. Daly.*

35. Notice to an agent placing out money on a mortgage, of a prior judgment, shall affect the employer. 2 *Ves.* 370. 1751. *Ashley v. Baile.*

36. Devise of land charged with payment of debts; if the devisee sells, pending a suit for sale and payment of debts, such an alienation is void. *Ambl.* 678. 1768. *Walker v. Smalwood.*

37. Mortgagee of a lease, which recited the surrender of a former lease, which was upon the surrender of a former, in which the plaintiff's title appeared, held to have notice of the title. 1 *Bro. Ch. Rep.* 291. 1788. *Coppin v. Fernyhough.*

38. Purchaser delaying payment ordered to pay interest. 1 *Ves. jun.* 94. 1790. *Child v. Lord Abingdon.*

39. The expence of conveyance falls on the purchaser, if there be no particular stipulation. 2 *Ves. jun.* 155. 1793. *Duke of Bolton v. Williams.*

40. Purchaser with notice is bound in all respects as the vendor; therefore where tenant for life granted leases for lives under a power, and bound himself upon the dropping of a life to grant a new lease, with the same provision for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale, though the power is exceeded, yet if a life drops in the life of

of the lessor, the purchasor having notice must specifically perform by granting a new lease, with the same provision: general notice to a purchasor that there are leases, is notice of all their contents. 2 *Ves. jun.* 437. 1794. *Taylor v. Stibbert.*

41. Purchasor being told that part of the estate was in possession of a tenant, was bound by the lease. *Ibid.* 440.

(F) Affected by Misapplication or the Money.

18 Vin. 122.

1. **O**N a trust or devise for payment of debts in general, without a specification of the debts in a schedule, a purchasor would be indemnified, and not obliged to see to the application of the money, or look after the creditors; but if there is such a specification, or schedule, a purchasor or mortgagee is bound to see to the application of the purchase-money. 1 *Ves.* 173. *Vide* also 1 *Ves.* 215. *Lloyd v. Baldwin.* Dec. 1748.

2. Devise to sell and pay debts generally; a purchasor is not bound to see to the application of the purchase-money. *Ambl.* 188. 1758. *Rogers v. Shillicorne.*

3. Where land is ordered generally to be sold, and the money to be part of the personal estate, the purchasor is not bound to see to the application of the money. 1 *Bro. Ch. Rep.* 186. 1783. *Smith v. Guyen.*

4. Where the first trust is for the payment of debts, the purchasor is not bound to look to the application of the purchase-money. 3 *Br. Ch. Rep.* 96. 1790. *Williamson v. Curtis.*

5. Purchasor not permitted to apply part of his purchase-money in discharge of a mortgage on the estate, though some of the parties consented, others being infants, and such incumbrance not appearing on the report. 1 *Ves. jun.* 266. 1791. ——— v. *Strutton.*

(G) Affected by presumptive Notice, where there is no Settlement. 18 Vin. 123.

1. **T**HOUGH a country attorney acts by an agent in causes in this court, yet he is to be considered as the solicitor likewise, though he resides in the country; and what is known to him is constructive notice to his clients. 3 *Atk.* 37. 1743. *Norris v. Le Neve.*

2. The agent of the defendant having full notice of the settlement made upon the husband's first marriage, this is notice to the defendant, and is also a sufficient equity in the plaintiff to postpone the second articles and settlement, notwithstanding these last only have been registered. 3 *Atk.* 646. 1 *Ves.* 64. 1748. *Le Neve v. Le Neve.*

3. As in purchases, and especially in mortgages, the same counsel and agents are frequently employed on both sides, there-

fore each side is affected with notice as much as if different counsel and agents had been employed. 3 *Atk.* 646. 1 *Ves.* 64. 1748. *Le Neve v. Le Neve.*

4. If on a marriage settlement an agent is employed on both sides, both will be affected by notice to him; nor is it material on whose recommendation or advice he was employed. 1 *Ves.* 64. 1747. *Le Neve v. Le Neve.*

5. No constructive notice from title-deeds, &c. to be laid before a counsel or attorney, or any thing that could not be supposed to make an impression on the memory. 2 *Ves.* 370. 1751. *Ashley v. Baillie.*

6. Notice of ancient marriage articles, by which an estate is agreed to be settled on husband for life, remainder to the heirs of his body, shall not affect the title of a purchaser from the husband by reason of the modern way of carrying such articles into execution. *Amb.* 285. 1755. *Senhouse v. Earl.*

7. If a purchaser cannot make out a title, but through a deed which leads to a fact, he will be affected with notice of that fact. *Amb.* 311. 1756. *Mertius v. Joliffe.*

8. Purchaser of land in a registered county, whose conveyance is registered, shall be affected by notice of a prior purchaser whose deeds were not registered, and be postponed to him. *Amb.* 436. *Le Neve v. Le Neve.* Dec. 1747.

9. *Query*, Whether a trustee having prepared a deed of appointment under a power, but not knowing of the execution of the deed, shall be presumed to have such notice as to affect him in respect of his payment of the money to a legatee under a subsequent will of the person who had the power. 2 *Bro. Ch. Rep.* 391. 1788. *Lothay v. Sydenham.*

18 Vin. 125.

### (K) Disputes between Purchasor and Purchasor.

1. **T**HE intent of the register act 7 *Ann. c. 20.* was to secure subsequent purchasers against prior secret conveyances. If a subsequent purchaser had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced. The enacting clause gives a subsequent purchaser the legal estate, but does not say he is not left open to any equity which a prior purchaser or incumbrancer may have. 1 *Ves.* 67. 1747. *Le Neve v. Le Neve.*

2. Prior incumbrancer cannot turn interest into principal to the prejudice of a subsequent incumbrancer, after notice. *Amb.* 612. 1763. *Digby v. Craggs.*

3. Registration in *Middlesex* under the statute of an equitable estate, is not of itself notice to a subsequent legal mortgagee so as to take from him his legal advantage. *Amb.* 678. 1768. *Marecock v. Dickins.*

4. Registration in a registered county is not notice of itself. *Ibid.*

5. One

5. One purchasor substituted for another on motion and consent. 2 *Bro. Ch. Rep.* 391. 1788. *Mathews v. Stubbs*.

6. The court will not discharge a purchasor and substitute another even upon paying in the money, without an affidavit, that there is no under-bargain. 6 *Ves. jun.* 515. 1801. *Rigby v. Macnamara*. *Vale v. Davenport*, 6 *Ves. jun.* 615. S. P.

(L) Purchasor, Biddings, Sale, and Deposit.

1. **W**HEN money is to be laid out under a marriage settlement in purchases, application must be made to the court in each separate purchase. 1 *Bro. Ch. Rep.* 74. 1780. *Harrington v. Flemming*.

2. Biddings opened on special circumstances, but not on mere inadequacy of price. 1 *Bro. Ch. Rep.* 287. 1783. *Prideaux v. Prideaux*, 2 *Ves. jun.* 51. S. P.

3. Where, on opening the biddings, the deposit was ordered to be laid out in the funds, and the stocks rose, the purchasor was held not entitled to the advantage of the rise. 2 *Bro. Ch. Rep.* 32. 1785. *Doyley v. Countess of Powis*.

4. On a sale in this court, the biddings may be opened even a second time, where the report of the purchasor has not been confirmed; but shall not be opened at all, if the report has been confirmed. 3 *Bro. Ch. Rep.* 475. 1792. *Scott v. Nesbitt*.

5. Biddings opened on a considerable advance, for an estate sold before the Master in separate lots, and the estate ordered to be sold in one lot; the residuary legatee and trustee appearing and consenting. 4 *Bro. Ch. Rep.* 113. 1792. *Watts v. Martin*.

6. Biddings are opened for the benefit of the suitor and of the estate, not of the purchasor; as where he was too late, and the over-bidding is small. 1 *Ves. jun.* 453. *Anon.* April 1792.

7. Biddings opened after confirmation of the report, upon special circumstances, as fraud. 2 *Ves. jun.* 51. 4 *Bro. Ch. Rep.* 172. S. C. *Watson v. Birch*.

8. Motion, that a person reported best purchasor should complete his purchase by a certain day, refused, the report not being absolutely confirmed. 2 *Ves. jun.* 335. 1794. *Anon.*

9. The bill praying an inquiry into the title and a specific performance, on the defendant's motion, after answer, an enquiry was directed as to the title, at what time the abstract was delivered, and whether it was sufficient; but the court would not decide upon any matter of relief. 3 *Ves. jun.* 279. 1796. *Moss v. Matthews*.

10. Relief against forfeiture of the deposit, putting the other party in the same situation as if the contract had been performed at the time agreed. *Ibid.*

11. Exceptions, that the persons entitled to the purchase-money, subject to the charges, were not parties to the conveyance, over-ruled.

**Purchaser.**

ruled. 3 *Ves. jun.* 504. 1797. *Wakeman v. The Dutcheffs of Rutland.*

12. On opening biddings, the court, in the reference of costs of the purchaser, will not give a particular direction for a specific expence. 2 *Ves. jun.* 286. 1793. *Anon.*

13. Biddings opened on advancing 100*l.* on 800*l.* and 200*l.* on 1200*l.* *Ibid.* 487.

14. Biddings opened on advance of 50*l.* on 380*l.* and paying the expence, 10*l. per cent.* not sufficient on a small sum. 4 *Ves. jun.* 700. 1799. *Upton v. Lord Ferrers.*

15. Biddings opened after the report confirmed simply upon an advance of 61*l.* on 305*l.*, 35*l.* not sufficient. 5 *Ves. jun.* 86. 1799. *Chetham v. Grurgeon.*

16. Biddings opened on advance of 200*l.* upon 3200*l.*, but 100*l.* was held too little. 5 *Ves. jun.* 148. 1799. *Anon.*

17. Biddings opened on an advance of 200*l.* on 2360*l.*; the person, on whose behalf the motion was made, being prevented from bidding, and having employed a surveyor to value the estate, who attended as agent bidding for the purchaser. 5 *Ves. jun.* 655. 1800. *Tait v. Lord Northwich.*

END OF THE FIFTH VOLUME.





